SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 411

AMINO BROTHERS COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner Amino Brothers Company, Inc. prays that a writ of certiorari issue to the United States Court of Claims to review its final judgment in the above-entitled case for the following reasons and upon the following grounds:

OPINIONS BELOW

Under Rule 53 of the Rules of the United States Court of Claims the trial of the case was referred to a Commissioner of that Court. Pursuant to the authority thus vested the Commissioner filed his report containing his opinion, findings of fact, and recommended conclusion of law. This Report is reprinted in the Appendix at page A1. The opinion of the Court of Claims is reported at 372 F. 2d 485, and is printed as Appendix B. The Opinion of the Corps of Engineers Board of Contract Appeals, identified as Eng. BCA No. 1582, is reprinted as Appendix C.

JURISDICTION

The Opinion of the Court of Claims was filed, and judgment dismissing the petition was entered on February 17, 1967. Pursuant to leave, plaintiff's motion for rehearing was filed on April 7, 1967, and denied on May 12, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Is the Court of Claims correct in extending the decision in *Horowitz* v. *United States*, 267 U.S. 458, to require the omnibus immunization of the defendant sovereign from liability for the breach of those covenants which would be implied in the contracts of private parties?

2. Is this defendant bound to an implied covenant not to hinder the performance of its contractors to some extent less than that of a private contractor?

3. Without being accountable under the Tucker Act may the agency administering a government contract by act of that same agency impede the performance of its contractor by an act that is simultaneously the performance of a public function?

STATUTE INVOLVED

Jurisdiction below was asserted under 28 U.S.C. 1491 providing that:

> "The Court of Claims shall have jurisdiction upon any claim against the United States founded either under the Constitution, or any act of Congress, or any regulation of an executive department, or upon any expressed or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

STATEMENT

Invoking such jurisdictional grant, plaintiff on May 7, 1962, filed in the Court of Claims its petition for damages resulting from specified breaches of the express and implied covenants of a contract it had executed with the defendant in January of 1957 (R. 1).

Plaintiff began in 1958 to seek such administrative relief as might then have been available under the standard clauses of defendant's form of construction contract re-referred to as the "Change Conditions" and "Suspension of Work" clauses. Such relief was denied by the defendant's Contracting Officer and subsequently by the Corps of Engineers Board of Contract Appeals in a written opinion dated April 18, 1961 (Eng. BCA No. 1582).

Pursuant to its Rule 52 the Court of Claims referred the cause to its Commissioner for a trial of the issues and the making of findings of fact. Being prior to the decisions of this Court in *United States* v. *Utah Construction Co.*, (1966) 384 U.S. 394, and the *United States* v. *Anthony Grace & Sons*, (1966) 384 U.S. 424, over defendant's objections a *de novo* trial was held before the designated Commissioner. On March 25, 1966, that Commissioner filed a report of his findings and a recommended conclusion of law that plaintiff was entitled to judgment in an amount reserved for further proceedings under Rule 47 (c) of that Court (App. p. A33).

Such a recommendation was based upon the ultimate finding that, "Defendant's agents impeded performance under the contract and also demonstrated an unreasonable lack of cooperation with the contractor" (Finding No. 21, App. p. A31) and thereby breached the implied covenants of its contract (*ipse*, pp. A13, A15-A16). The contract the performance of which was impeded was one which involved,

basically, the excavation of a 3,948 foot segment for a cutoff channel for the Smoky Hill River about Salina, Kansas; the transportation of the excavated material across the existing stream; and the deposit of the excavated material on the other side to form a proposed levee (Finding No. 2, App. p. A17). The notice to proceed with the work of the contract was issued on February 15, 1957, and the work was to be completed by August 15, 1957 (Finding 14, App. p. A27).

Both parties were found to have contemplated that the existing stream would be traversed by the construction of a low water crossing of a type similar to that described by the contract specifications (App. p. A6, Finding No. 11, App. p. A23). Such a crossing would permit hauling equipment to pass over it from one side to the other and would contain pipe conduits of a size sufficient to allow a determinable amount of water in the channel to flow through (Finding No. 15, App. p. A28).

The amount of water flowing in the channel and which the crossing would have to accommodate was, within limits, controlled by the operation of the outlet gates of several upstream dams (Finding No. 3, p. A17). The contract was being administered by the Construction Division of the Kansas City District Office of the Corps of Engineers; the times and extents to which the dam gates would be opened was determined by an employee of the Water Control Section of the same local office (App. p. A6). The failure of the latter officials to advise and consult with the former, and through them the contractor, and to co-ordinate the gate openings with the petitioner's construction activities (Findings Nos. 17, 18, 23) constituted the "lack of cooperation" referred to by the Commissioner. The period during which this "impeded performance" of the contract by releasing water in such quantities as precluded use of the crossing is noted as being from May 16 to October 14, 1957

(App. p. A31, fn.). Upon findings of cause beyond the contractor's control, petitioner was administratively granted extensions of time within which to complete but no monetary compensation for the expenses incurred during the five month period of interruption (Finding 25, pp. A32-A33).

Having found that defendant's agents had breached the implied covenants to cooperate in performance[1] and not to knowingly preclude use of the crossing, the Commissioner found it unnecessary to decide petitioner's allegations as breaches of the express covenants by the failure to afford administrative relief (App. p. A14).

The administrative agency had determined that relief under the contract clauses was not available since the operation of the gates of the dam was a "sovereign act" within the meaning of a decision of this Court in *Horowitz* v. *United States*, (1925) 267 U.S. 458. As to the facts, the Commissioner found that, while technically a trial *de novo*, the facts as found by him in no way contradicted or departed from those administratively determined (App. p. A15)—save the additional finding that those facts constituted the above breach. As to the application of the *Horowitz* decision the Commissioner disagreed with the Board as he noted he had a right to do even under the limitations of the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321. Contrary to the Board's interpretation of that decision the Commissioner opined that there were certain kinds of even "sovereign acts" for which this defendant might be liable under *Horowitz*, that the asserted defense was not a blanket absolution but one which had to be examined on a case by case basis (pp. A10-A11). By accepting bids based upon the mutually contemplated performance necessitating

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1. *Luria Brothers & Co.* v. *United States*, (Ct. Cl., 1966) 369 F 2d 701; *Chalender* v. *United States*, (1954) 127 Ct. Cl. 557, 119 F. Supp. 186.

the use of a crossing, the defendant had impliedly covenanted that it would not knowingly perform even a "sovereign act" which would preclude such performance (App. p. A10). For the breach of such an implied covenant even the sovereign should be held liable under the Tucker Act (App. p. A33).

The judges of the Court of Claims, however, reached still a different legal conclusion on these same facts. Not only did the *Deming-Jones-Horowitz* line of decisions preclude the imposition of liability "directly or indirectly" for breaches of contract which, committed by a public agency, were also public acts (App. p. A45), the implied covenant of every private contract not to hinder the performance of the promissor could not in the case of a sovereign defendant be discerned (*ipse*, p. A46). The petition was, accordingly, dismissed.

REASON FOR GRANTING THE WRIT

From such a holding we seek review on behalf of this appellant and all government contractors. The recent and increasingly numerous decisions of the Court of Claims, the government contractor's only judicial forum, denying administrative and judicial relief to the government contractors solely because of, what we submit to be, a misconstruction of this Court's 1925 decision in the *Horowitz* case (*supra*, 267 U.S. 458) constitutes such an erroneous and unguided departure from the limited holding of that decision upon an increasingly important question of the growing field of federal contract law and so conflicts with that decision as to call for the exercise of this Court's supervisory duty to issue the necessary clarification.

In the first volume of the reports of the Court of Claims we find two seemingly innocent, apparently commonplace,

decisions: at page 190, *Deming* v. *United States,* (1865, 1 Ct. Cl. 190); at page 383, *Jones* v. *United States,* (1865, 1 Ct. Cl. 383).

Both seemed innocuous enough, both for many years were, *Deming* was but the complaint of one who had contracted to provide certain rations for the Marine Corps at a fixed price. The next year the Congress imposed additional duties on many of the articles composing the rations; the following year it enacted the Legal Tender Act. Both acts increased the plaintiff's costs of furnishing the rations. In sustaining a demurrer the newly-founded Court noted that in permitting itself to be sued upon its contracts the government intended to assume only the obligations of any other contracting party, to give its contractors the same rights they would have against any other defendant—not more. Since the ordinary promisee would not be liable for changes to the subject matter effected by subsequent legislative enactments, neither should this particular defendant. Since the action would not sound against a private citizen, this defendant should be held to no greater liability. The *Jones* decision, the two engineers complaining that their work of surveying the Indian Territory was made more difficult when the government withdrew the troops, was equally commonplace and noted that the principle applied in *Deming* was as applicable to executive as it was to legislative enactments. "If the removal of troops from a district liable to invasion will give the claimant damages for unforeseen expenses, when the other party is a corporate body, then it will when the United States forms the other party, but not otherwise (l.c. 385)".

Such decisions remained relatively obscure. Almost casually, this Court merely quoted at length from *Jones* in sustaining the demurrer to the complaint in *Horowitz* v. *United States* (*supra,* 267 U.S. 458) of the contractor

seeking to recover a missed bargain caused by the executive embargo.

Such citations found but infrequent use until the advent of the second World War increased not only the volume of government contracting but also the variety of factual situations arising therefrom. The Court of Claims began to find use for the *Horowitz* citation in such cases as: *Gothwaite* v. *United States,* (1944), 102 Ct. Cl. 400; *Kelly Company* v. *United States,* (1947) 107 Ct. Cl. 594, 69 F. Supp. 117, *Froemming Bros.* v. *United States,* 108 Ct. Cl. 193, 70 F. Supp. 126, *Ross Electric Construction Co.* v. *United States,* 111 Ct. Cl. 644, 77 F. Supp. 749.

Each of such decisions merely applied to the defendant contractor (who was but incidentally the sovereign), the defense available to any other defendant under traditional principles of contract law—that a supervening legislative, executive, or judicial act may so change the subject matter of the bargain as to remove it from the contemplated performance and that, unless he has contributed thereto, a promissor may be thereby discharged.[2]

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2. As summarized in the *Restatement of Contracts* (Sec. 458):

> "A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or a contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited
>
> (a) by the Constitution or a statute of the United States, or any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such state, or
>
> (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States or any one of the United States." Cf. Williston (1938 Ed.), Sec. 1938; C.J.S., *Contracts,* Sec. 463 (1); 17 Am. Jur. 2d, *Contracts,* Secs. 411, 418, 419.

The *Deming-Jones-Horowitz* citations have of late, however, found new and, we submit, wholly unintended uses. In case after case before the admistrative agencies and the Court of Claims, these citations are being used to support a radical and all-encompassing defense to the otherwise supportable claims of the increasing number of government contractors. Unfettered by review by this Court such agencies and such Court have begun to fashion without definition, limitation or exception a defense new to the law of contracts, a sovereign immunity from contractual as well as tort responsibility. The meaningless term "sovereign act" has become an abracadabra by which meritorious claims can be made to disappear, a cloak which may be drawn over any act without fear of answering to any court, a genie who upon the invocation of the magic words can accomplish tasks of infinite variety for a master who in a federal system of delegated powers cannot be said to act other than as a sovereign.[3] Although consent to be sued upon its contracts, expressed and implied, was long ago given by the Tucker Act, that consent is effectively withdrawn whenever this defendant chooses to term its breach the act of the soverign. Cf. *Bateson-Stolte, Inc.* v. *United States,* (Ct. Cl. 1962) 305 F. 2d 386;[4] *Wah Chang Corp.* v. *United States,* (1960) 151 Ct. Cl. 41, 282 F. 2d 728; *Air Terminal Services, Inc.* v. *United States,* (Ct. Cl. 1964), 330 F. 2d 974; 39 Harv. L.R. 388 (1926); 36 Va. L.R. 800

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3. As succinctly noted in *United States* v. *Interstate Commerce Comm.*, D.C., 78 F. Supp. 580, 583, rev'd on other grounds, 337 U.S. 426: "It may be observed in this connection that the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietory capacities. *Graves* v. *People of New York,* 306 U.S. 466, 477, 59 S. Ct. 585."

4. This is the second decision. In the first decision, 145 Ct. Cl. 385, 172 F. Supp. 454, the court had refused to apply the doctrine when, as here, the breaching agency was the same as the enacting agency.

(1950); 44 Geo. L. J. 77 (1955); McBride & Wachtel, *Government Contracts,* Sec. 3.10. Thus the Court has come to the stage of the astounding pronouncement found in *Wunderlich Contracting Co.* v. *United States,* (Ct. Cl., 1965) 351 F. 2d 956, 967, "Even though the contractor be directly or indirectly injured by the detrimental effect . . . he has no legal cause to complain if it is the sovereign that renders his performance more difficult to complete."

For more than forty years this maxim of inexhaustible use has stood without review by this Court, the only Court to which the power to review has been entrusted. It proceeds to ever new applications without qualifications in law or exception in fact, regardless of the circumstances of the nature of the offending act. As importuned by Chief Judge Jones, on the occasion of his dissent in the *Air Terminal Services* case (*supra,* l.c. 984), unless a limit is soon fashioned, and it can only be fashioned by this Court, this defendant has found itself a weapon which it is wielding with unbridled and increasing vengenace to a tyranny strange and becoming our system of government:

> "Today, as the activities of Government become more complex and the Government is engaging in wider fields of activity, the need is becoming manifest that there should be a more accurate definition of the term sovereign act and a more flexible application of its effects on day-to-day activities. As we enter the electronics and space age, the contracts with the Government will become vastly more complicated. Already the Government is necessarily spending billions on national defense involving immense contracts. The Nation's business, which was once primarily local, has become largely interstate, greater sums are being and will be spent on conservation projects, irrigation, soil and water conservation, as well as military and other development projects.

"If the contractors on these great projects are to be met at frequent trouble spots with the plea of a sovereign act as a defense against the Government's interference with their operation of public contracts, they will of necessity take these road blocks into consideration in calculating and submitting their bids. The costs to the Government will be higher, the irritations and misunderstandings will be greater and court dockets more crowded.

"It would be in the interest of all concerned if either the limits of the term would be better defined or if a more flexible approach to the old harsh doctrine could be had, especially in peacetime periods. As it is, the contractor must face the uncertainty; the lawyers for the defense must raise the defense of a sovereign act if there is any possibility of its application; the lawyers for plaintiff must continue to insist that it does not apply—thus carrying on a continuing cold war. That conflict is gradually ripening into a real battle, with the litigants charging back and forth across a no-man's land, with the courts being caught in the middle. As in most modern wars, everyone loses.

"The Government's immunity from the consequences of a sovereign act is a valuable and essential right. It should be invoked where and to the extent it is applicable. But it is a powerful weapon and should not be used in too wide a field or to cover inappropriate matters under the guise of necessary protection for the Government. It is fitting to say, 'O, it is excellent to have a giant's strength; but it is tyrannous to use it like a giant.' ("Measure for Measure", Act II, Sec. 2, line 107)."

CONCLUSION

We respectfully submit that this case offers the appropriate opportunity to fashion for Chief Judge Jones and his fellow members of the Court of Claims the definition

and guideline he, all government contractors, the administrative boards, and the supervising employees so badly need. We submit that the intent of *Horowitz* was to apply to this defendant the law applicable to a private contractor, not to elevate it beyond the law. The writ is badly needed.

Respectfully submitted,

JOHN A. BIERSMITH
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF CLAIMS

No. 158-62

(Filed March 25, 1966)

AMINO BROTHERS COMPANY, INC

vs.

THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

John A. Biersmith, attorney of record for plaintiff. *Charles T. Rafter, Jr.*, of counsel.

Frances L. Nunn, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Opinion

McMURRAY, *Commissioner*: Plaintiff, a general contractor experienced in the heavy construction business, seeks to recover damages in the sum of $301,530 incident to delay periods occurring during the performance of a contract with an agency of defendant, the United States Army Corps of Engineers. The claim was denied by the contracting officer

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

APPENDIX

and ultimately by the Corps of Engineers Board of Contract Appeals (hereafter referred to as Eng. BCA) in a written opinion dated April 18, 1961 (Eng. BCA No. 1582). Plaintiff's Motion for Reconsideration and/or Rehearing was denied on January 25, 1962 (Eng. BCA No. 1582).

The petition arises out of the contract which requires the excavation of a 3,948-foot segment of a cutoff channel for the Smoky Hill River at Salina, Kansas. Under its provisions, the contractor also had to utilize suitable excavated materials and materials from designated borrow pits to construct segments of a flood control levee of approximately 15,000 feet. Since the construction involved crossing the Smoky Hill River with various excavation materials, some method of providing for a crossing was necessary. Plaintiff was permitted by provision 2—13 Channel Crossings to construct a low-water crossing on the river in strict accordance with the provision. It required not less than 64 square feet of effective opening in the channel at each crossing, the flow line at each opening to be set at the flow line of the existing channel, the removal of the crossings whenever the contracting officer decided they would adversely affect the river stage, the crossing to be used solely for the contractor's hauling equipment and removal of any crossings built at the completion of the work or whenever no longer required. A crossing was constructed by plaintiff during performance under the contract. It was washed away, rebuilt and again washed away, resulting in the delays which are involved in this suit. The alleged proximate cause of these washout delays was the operation of the defendant's flood control dam gates at Kanopolis Reservoir by the Corps of Engineers, approximately 85 river miles upstream from the Salina site on the Smoky Hill River.

The current president of the plaintiff corporation and partner of its predecessor, Mr. Victor Amino, has been with the company since 1946 and is a 43-year resident of Kansas.

He learned of the proposed letting of the Salina contract while plaintiff herein was performing a levee contract on the Salt Creek at Barnard, Kansas. He requested and received a copy of the plans and specifications describing the proposed Salina project. Desiring to view the proposed work site, he went by auto to Salina to view the area. He was accompanied by defendant's inspector at Barnard, Kansas, Mr. Fred L. Wolfe. Wolfe had over 30 years' experience in the Corps, but had only a limited knowledge of the area involved for he had only recently been assigned to the Kansas district. The rather brief 2-hour examination of the proposed site, plus two subsequent visits, satisfied Amino and plaintiff bid $202,316 on the contract. The bid was accepted and plaintiff was awarded the contract on February 14, 1957.

Plaintiff contends that it was misled by certain statements made by Wolfe during their visit to the site about the likelihood of a low-river level and continued dry conditions at the proposed site and the channel crossing provision. Although Wolfe, during the Board's proceedings and at the trial, denied making the statements, the Board found that even if the statements were made they did not amount to any representations upon which a contractor could reasonably rely. Although certain subtleties of expression regarding the alleged wording of the statements occurred between the testimony before the Board and testimony at the trial de novo, the difference in degree does not raise these statements to the level of representations which could reasonably be relied upon. A contractor with plaintiff's experience, who was already engaged in a flood control levee construction at Barnard, Kansas, could not reasonably construe statements involving prospective weather conditions as a representation of a material fact. At best, it could only be construed as an opinion about possible weather conditions made by someone with no better qualifications than plaintiff had for predicting future weather conditions.

The drawings and plans in the proposed contract, including the channel crossing clause, were not tantamount to a representation of low river stages. The presence of the Kanopolis Reservoir was shown on the drawings and it is also indicated by the plans and specifications that this was a flood-protection project. The language of the channel crossing provision, considered with other provisions, relating to alternative methods of transporting excavated materials and machinery over the river utilizing state and county roads and city streets, indicates that it was merely a suggested method which did not have to be utilized by the contractor. Subsection *a* which provided for not less than 64 square feet of effective opening to effect the passing of a sufficient volume of water to downstream users, as indicated by the warning in subsection *c*, was not a warranty that a crossing of these dimensions would be able to withstand whatever flow the elements might speed toward it or a warranty of the velocity of these flows. A United States Weather Bureau summary, included in the plans and specifications, indicated what could be expected if maximum monthly precipitations of the past recurred. Nothing in the pre-bid activities and the plans and specifications furnished plaintiff by defendant with respect to the condition of the proposed site, and contemplated work, was false or misleading. Plaintiff could have reasonably relied upon the information made available by defendant. It is, therefore, found that no misrepresentation was involved. *Archie & Allan Spiers, Inc.* v. *United States*, 155 Ct. Cl. 614, 296 F.2d 757 (1961).

The plaintiff alleges that it was also misled by the withholding of hydrological information about the Kanopolis Reservoir and its possible effect on river stages downstream. Defendant's representatives testified that in view of the 6-year drouth condition prevailing in that area when the plans and specifications were prepared, it was felt that adding this

information would only serve to mislead bidders. This information is normally provided only in contracts relating to navigable rivers, which are not involved here. This seems an imprudent custom and it is speculative as to whether such information would have misled bidders, in view of (1) the publicity given the dam, (2) the availability of such information to the public, (3) the unusual history of drouth conditions in the area and (4) the prior experience of plaintiff. However, the Board's determination that the omission of such information did not mislead plaintiff appears logical. This circumstance, standing alone does not establish a basis for recovery by plaintiff.

Amino testified that he estimated finishing the job within 90 days. Plaintiff's estimate was optimistically based on continuing favorable circumstances as borne out by subsequent events. Notice to proceed was dated February 14, 1957, and it was initially required that the job be finished on August 15, 1957.

After a written request by the contractor in late February, 1957 to have the controlled releases of water at the Kanopolis Reservoir cut off to facilitate installation of a channel crossing, the controlled flow was reduced to 10 c.f.s. (cubic feet per second), a level required by previous commitments to downstream users. Plaintiff received a letter from defendant stating the flow would be reduced. Accordingly, plaintiff installed a crossing on March 6, 1957, with two corrugated metal pipes providing for slightly more than the required minimum 64 square feet of opening and covered with earth fill effecting a 16-foot wide roadway. During the period from May 13, 1957, to May 22, 1957, heavy rains and wet ground conditions precluded work at the site and high river stages washed out the first crossing established by plaintiff.

Much evidence was presented at the hearing before the Board and during the trial concerning events following the

initial washout of the crossing. Based on the record, it is obvious that plaintiff was not able to reinstall the channel crossing until September 5, 1957, and it could not, therefore, utilize the normal method of performing the work which required the utilization of a channel crossing. Plaintiff claims that defendant's conduct breached its duty to cooperate and that defendant should have issued a "suspension order" under the contract suspension of work clause, making an adjustment in the contract price in the amount of the additional expense and that an equitable adjustment should have been granted pursuant to the changed conditions clause of the contract.

Defendant maintains that its actions in the operation of the Kanopolis Reservoir during the idle period from May 13 to 22, 1957, were in performance of sovereign acts and not within its capacity as a contractor and, accordingly, no liability is chargeable to defendant in this regard. Such a sweeping assertion is deemed to be far too broad. The same Governmental agency which contracted with plaintiff for performance of work required by the contract also controlled the operation of the gates at Kanopolis Dam. Because of an uncontrolled spillway and an uncontrolled outlet which automatically increases its discharge as the elevation of the reservoir is raised, some amount of flow in the river channel is inevitable. The runoff in the area between the Reservoir and Salina also adds to the flow and its effect cannot be entirely controlled. However, a certain amount of flow is directly related to the discharge of accumulated waters through the controlled gates. These discharges are normally made at a level sufficient to prevent downstream flooding, but with a view towards maintaining adequate flood control storage for future accumulations. Evidence presented regarding hydrological events was based, in part, on measurements obtained at the United States Weather Bureau rainfall stations above and below the Kanopolis

Reservoir and river flow measured by the Department of Interior, Geological Survey, records from a station a few miles upstream from Salina. Defendant's Chief of the Water Control Section, Mr. William L. Northrup, testified concerning the manner whereby he arrived at certain estimates on river flow at the work site during this period (May 13-22, 1957) and the source of these flows. Pursuant to a stipulation by the parties, the transcript of testimony given at the Board hearing by a consulting engineer, Mr. E. I. Myers, plaintiff's expert, was made a part of the record in the trial de novo. His testimony essentially related to the amount of water the contractor's channel crossing could pass and whether or not hydrological information should have been included in this contract, but no competent or conclusive evidence has been presented by plaintiff to refute the source of river flow during this period and the relationship of the controlled discharges to the overall flow. Northrup testified that during this period, from information obtained from the contracting officer, defendant's representatives determined that with discharges at the dam of 860 c.f.s. plaintiff's first crossing would be overflowed; with slightly more flow would be washed out; and that another crossing could not be installed unless controlled discharge flow could be maintained at about 250 c.f.s. Testimony and exhibits were produced which supported defendant's contention that peak runoff from the local area would have been sufficient to wash out the channel crossing during the period May 13—22, 1957, that uncontrolled releases from Kanopolis were sufficient to keep the flow above 250 c.f.s. until the end of August, 1957, and that controlled releases operating in conjunction with other factors prevented the reinstallation during one brief period in June when it could have been reinstalled.

Plaintiff installed a second channel crossing on September 5, 1957. It was successfully utilized for hauling exca-

vated materials until September 15, 1957, when the river flow washed out a section of topping. The relatively minor damage was repaired within a few hours. Due to a misunderstanding concerning the information transmitted via radio to headquarters and relayed to managers at the dam, it was assumed by certain individuals that the crossing had been washed out. It was then decided to release some accumulated water at the rate of 2,200 c.f.s. When the area engineer learned via the radio communications system that the crossing had been repaired, he called the dam officials to stop the opening. He was advised that it was too late because the flow of additional water was already on the way. Officials at the work site were informed of the gate opening and plaintiff promptly removed the crossing to have the pipes for later use. If plaintiff had not removed the crossing, it would have been destroyed by the surging water or washed out completely.

The defendant's sovereign capacity with respect to operation of the gates at Kanopolis is its main line of defense. It is established by the evidence, and found by the Board below, that if the controlled releases were coordinated with the river flow and rainfall solely for the benefit of the contractor, the first crossing would have washed out and the installation of a second one would have been prevented until September, 1957. But as to the destruction of the second channel crossing, different considerations are present. If there was no sovereign act involved, the claim could be based on "a breach of defendant's implied obligation not to hinder or delay performance of the contract for which plaintiff is entitled to damages." *Dale Construction Co.* v. *United States*, 168 Ct. Cl. 692, 704 (1964).

This court has recognized that the existence of the Tucker Act does not signify the end of the sovereign act doctrine in all its relationships to Government contract cases. The United States as a contractor cannot be held

liable for public acts of the United States as a sovereign. *Horowitz* v. *United States*, 267 U.S. 458 (1925); *Anthony P. Miller, Inc.* v. *United States*, 161 Ct. Cl. 455 (1963), *cert. denied* 375 U.S. 879; *Bateson-Stolte, Inc.* v. *United States*, 158 Ct. Cl. 455, 305 F.2d 386 (1962); *J. B. McCrary Co.* v. *United States*, 114 Ct. Cl. 12, 84 F. Supp. 368 (1949); *Jones* v. *United States*, 1 Ct. Cl. 383 (1865). The character of the act involved must be scrutinized to ascertain its general and public nature vis-a-vis its immediate effect on the contractor under the express or implied terms of the contract. *Wah Chang Corp.* v. *United States*, 151 Ct. Cl. 41, 382 F.2d 728 (1960); *Ottinger* v. *United States*, 123 Ct. Cl. 23, 106 F. Supp. 198 (1952). The dam involved in this case was a completed structure, operational since 1948, and operated by personnel with unpleasant memories of a flood in the same area 6 years earlier. Every resident living along the river would be dependent upon its skillful operation if unusual rainfall recurred.

In another setting, it has been said that when flood waters are to be released, even abuses of discretion as to a proper time for release are not actionable against the Government under the "discretionary function" of the Federal Tort Claims Act, 60 Stat. 842 (1946), 28 U.S.C. §2680 (a), *Guy F. Atkinson Co.* v. *Merritt, Chapman & Scott Corp.*, 126 F. Supp. 406, 410 (N.D. Cal. 1954), motion to dismiss third party complaint *granted* in part, *denied* in part, 141 F. Supp. 833 (N.D. Cal. 1956), *aff'd* final decision 295 F.2d 14 (9th Cir. 1961); *Olson* v. *United States*, 93 F. Supp. 150 (D.N.D. 1950). Previous Court of Claims decisions have not precluded characterization of similar acts of discretion as a sovereign act, if of a reasonable nature, and in conjunction with unusually heavy precipitation at an operating flood control dam where an analogous situation a few years earlier had caused heavy flooding. *Volentine & Littleton* v. *United States*, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959) involved

flooding caused by the deliberate premature closing of a cofferdam during construction of a main dam, not for the immediate protection of the public living along the river below the dam site, but to avoid Government liability for delaying the contractor who was doing the more expensive work constructing the dam. This flooding injured another contractor, Volentine & Littleton, plaintiff in that case, who was performing a clearing contract and who was given less than 24 hours' notice that the cofferdam would be closed.

It is apparent the defendant cannot successfully assert an action as a sovereign act when it is directed towards the contractor alone, *Sunswick Corp.* v. *United States,* 109 Ct. Cl. 772, 75 F. Supp. 221 (1948), *cert. denied,* 334 U.S. 827, and there are certain kinds of sovereign acts for which the Government can assume liability, *Beuttas* v. *United States,* 111 Ct. Cl. 532, 77 F. Supp. 933 (1948); *Gerhardt F. Meyne Co.* v. *United States,* 110 Ct. Cl. 527, 76 F. Supp. 811 (1948).

The contract in issue here contains a standard suspension of work clause. It is a settled principle of law that this clause impels a higher standard of cooperation on the part of the Government than even the implied obligation of cooperation present in every contract. *T. C. Bateson Constr. Co.* v. *United States,* 162 Ct. Cl. 145, 319 F.2d 135 (1963); *Sunswick Corp., supra.* In the *Bateson* case, *supra,* the Government was assessed liability for its performance of acts which it admittedly was permitted to do under the terms of the contract. However, the court stated in the course of its decision, 162 Ct. Cl. at 185:

> * * * In other words, in our opinion, the Government had the right to do any act within the terms of the contract, but if said action caused plaintiff delay and damages it follows that under certain circumstances the Government is liable to the contractor therefor.

The same might be said of the sovereign act doctrine, but the contract here must be interpreted and the facts scrutinized

in order to determine whether certain circumstances are present in this case which support a finding of liability on the part of the defendant for any of the delays involved.

While it is true that reasonable release of water from Kanopolis Dam may be characterized as sovereign acts, it can hardly be asserted that inadvertent or unwarranted releases of water should always gain the same protective mantle. From the facts of the case in suit, it is apparent that the releases of water which effectively destroyed the second channel crossing on September 15, 1957, were tantamount to inadvertent, improper or unwarranted releases. But for the mistaken conclusion that the crossing was already destroyed, it appears obvious that the gates would not have been opened or, if opened, would not have been opened with the same capacity flow of water. The decision to release water in such quantities was based on the defendant's mistaken assumption that the crossing was already destroyed and thus, if the assumption was well-founded, the contractor was in no way at fault for this error. The emergency factors present during the earlier releases of water in May, 1957 were not in existence in September, 1957. It is obvious that these releases were the sole proximate cause of the loss of the crossing in September, 1957, while the facts establish that this was not the case in the May, 1957 washout. At that earlier time, even without controlled discharges, the crossing would have washed out from uncontrolled releases and it could not have been installed again before September, 1957. Therefore, it must be ascertained whether or not the contract terms shed any more light on the effect of these circumstances.

Provision 2—13 of the contract provides:

> 2—13. *Channel Crossings.* The Contractor may construct for his own use within the right-of-way, low water crossings on the Smoky Hill River in strict accordance with the following:

a. Provide for not less than 64 square feet of effective opening in the channel at each crossing.

b. The flow line of the openings shall be set at the flow line of the existing channel.

c. The Contractor shall remove the crossings wherever in the opinion of the Contracting Officer the river stage would be adversely affected.

d. The crossings shall be used for the sole purpose of the Contractor's hauling equipment.

e. The Contractor shall remove the crossings upon completion of the work or whenever its use is no longer required.

While the contract provisions were not of such character as to amount to a misrepresentation of favorable river flows, there was an implied promise in this case similar to the one contained in *Meyne, supra.* There, the court construed a contract provision, which stated that certain roads would be used, to be a representation that these roads would be available during the life of the contract. From this specification, the court implied a promise by the Government to pay any increased costs by the plaintiff caused by the exercise of sovereign power which made the roads unavailable. Military authorities ordered the road closed and plaintiff recovered costs resulting from that act.

Although the parties to this action used the more permissive word "may" in the specifications for the channel crossing rather than "shall" as in *Meyne, supra,* the same result appears to follow. Plaintiff testified that the use of any of the alternate methods of transporting materials, suggested by the contracting officer, would substantially increase costs and this was not effectively controverted by defendant. Since other bids and the Corps of Engineers' estimate on this project were reasonably in line with plaintiff's low bid, it obviously was not contemplated by either party that if a channel crossing could not be utilized because

of high water, alternative methods would be used. Whatever costs an alternative method for crossing might entail at the onset of the contract, the changing of methods during performance while impeded by high river stages would, as the defendant undoubtedly knew, have caused prohibitive costs. If bidders had attempted to condition bids on such an alternative contingency, it would not have been acceptable to defendant. See 32 C.F.R. § 591.403(b) (1955). It is reasonable to conclude that the defendant hoped all bidders would reduce their bids in contemplation of utilization of the inexpensive method of crossing the river, thereby lowering the contract costs. When the channel crossing provision is viewed vis-a-vis, the added degree of cooperation compelled by the inclusion of a suspension of work clause, *Bateson, supra,* 162 Ct. Cl. at 186, it is obvious that, should the suggested channel crossing method be chosen and used at the onset of the contract, it would be the sole method utilized. It is apparent that if the crossing was built to the minimum specifications, defendant was impliedly promising that, if reasonably possible, it would not knowingly perform any sovereign acts which would preclude use by plaintiff of the channel crossing method adopted. It appears clearly established that such promise was inadvertently broken by defendant in this case.

A question with respect to defendant's responsibilities for the inadvertent breaking of an implied promise remains. In *Meyne, supra,* costs were permitted for the installation of a reasonable alternate route. The only reasonable alternate route available to plaintiff in its performance was another channel crossing. One could not be installed until the river flow subsided and a substantial delay was incurred. In view of the circumstances surrounding this second washout, the delay was both unnecessary and unreasonable.

Defendant contended that if it had not opened the gates of the dam at any time, the flow of the uncontrolled

discharges would have increased and prevented installation for a much longer period of time than is involved here. But this is of no legal significance. Merely because sovereign acts during the first delay period may have aided the plaintiff is no reason for offsetting that cooperation against an obvious interference with plaintiff's performance under the contract which caused the culpable second period of delay.

Since an implied promise was obviously intended, according to the pertinent provision in this contract, and since the failure of defendant to honor this promise was a breach of contract, it may be unnecessary to decide whether or not the addition of a suspension of work or a changed condition clause in a contract always adds additional liability on the part of the Government because of sovereign acts. It is enough to state that the suspension of work clause incorporates and goes beyond the traditionally implied provision of cooperation in any contract, *Bateson, supra.* Whether or not, under such a clause, the contracting officer must, at the contractor's request, suspend work in order to release a contractor from maintaining the minimum required plant on the job and permit its utilization elsewhere when the cause of the suspension is a continuing sovereign act need not be decided since no such request was made. It may well be that when the cause of the stoppage is not the fault of the contractor, but a sovereign act by the contracting agency, even though the defendant did not desire or benefit therefrom, it should, in good faith, order a suspension of work. Compare *Flippin Materials Co.* v. *United States,* 160 Ct. Cl. 357, 312 F. 2d 408 (1963), and *Ozark Dam* v. *United States,* 153 Ct. Cl. 120, 288 F. 2d 913 (1961), with *T. C. Bateson Constr. Co.* v. *United States, supra.* It is not necessary to decide whether or not this case presents a "changed condition" within the meaning of that provision of the contract because, absent the implied promise, the sovereign act doctrine precludes any recovery.

Defendant's final contention revolves around the assertion that the decision of the Eng. BCA is final within the ambit of the Wunderlich Act, 68 Stat. 81 (1958), 41 U.S.C. § 321 (1964), and must be viewed accordingly. Because the Board based its decision principally on the sovereign act doctrine and never considered the interpretation of the channel crossing provision in the light of the additional obligations assumed when it was viewed against the suspension of work provision, the Board obviously recognized that any such interpretation of this provision was a matter of law and the remedy for any breach of implied promises would not be within its jurisdiction. Absent a trial de novo the Board could not have bound this court by any such interpretation. *Merritt, Chapman & Scott Corp.* v. *United States*, 174 Ct. Cl. — (No. 69-62, January 1966), and cases cited therein. The Board thrust the onus of interpretation of the contract provisions on this court in deciding the case on the narrow ground of sovereign immunity, which we have decided was not entirely valid. Whether or not the denial of the motion to restrict proceedings to the administrative record was proper, defendant did appeal within the procedures for review afforded it by Rule 55(a) (3). *Stein Bros. Mfg. Co.* v. *United States*, 162 Ct. Cl. 802, 337 F. 2d 861 (1963). In any event, in retrospect, the evidence adduced at the trial de novo in no substantial way contradicted the facts as presented to and found by the Board. The decision rests on an interpretation of the channel crossing provision, a question of law which ultimately must be decided by this court.[1] Since this decision is based on the interpretation of the interrelated provisions contained in this con-

1. The commissioner has had the same perspective concerning credibility of the witnesses as would be gained by the Board if a rehearing should be held with a reopening of the Board proceedings in an effort to find new or additional facts and would apparently be based on an even more remote memory concerning credibility.

tract, the same decision also flows from a review strictly of the administrative record under the requirements of the Wunderlich Act, *supra.*

The extra expenses incurred by plaintiff which defendant impliedly promised to pay because of its sovereign acts constitute the damages occasioned by delays chargeable to defendant. Plaintiff is entitled to recover, the amount to be determined by further proceedings pursuant to Rule 47(c).

Findings of Fact

1. Plaintiff, Amino Brothers Company, Inc. was formed in 1932 as a partnership and was incorporated on April 1, 1957, under the laws of the State of Kansas. On May 14, 1962, plaintiff filed a petition in this court claiming the sum of $301,530 for damages incurred in the performance of a contract with the United States Army Corps of Engineers. A hearing on plaintiff's claim was held before the Corps of Engineers Board of Contract Appeals (Eng. BCA No. 1582) and the claim was denied on April 18, 1961. Plaintiff's motion for reconsideration and/or rehearing was denied on January 25, 1962.[1]

2. Mr. Victor Amino, the president of plaintiff corporation has been in the construction business since 1946.

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1. Plaintiff claims that it incurred an average monthly general overhead expense of $4,000 for a period of 10 months from February 15 to December 14, 1957, a total of $40,000. Defendant responded to plaintiff's submission pursuant to former Rule 28(b) of this court (now 43(d)) which did not include an item for overhead. During the trial a ruling concerning the item for overhead was made adverse to plaintiff who later offered to prove that defendant was advised of the overhead phase of plaintiff's claim by showing that the matter was set out in paragraph 57 of plaintiffs pretrial memorandum as follows:

> Plaintiff's average monthly general overhead expense during the year in question was $4,000 or for the ten month period of February 15 to December 14, 1957, $40,000.

That information was mailed to defendant on October 6, 1962. The commissioner's ruling as reflected in the trial transcript should be disregarded.

While his firm was performing a levee construction, flood protection project at Barnard Kansas, on the Salt Creek, he received notice from the Corps of Engineers, Kansas City District, of the proposed letting of a construction contract for a cutoff channel, levees, and appurtenances on the Smoky Hill River near Salina, Kansas, proposed under the authority of the Flood Control Act of September 3, 1954, P.L. No. 80, 83rd Congress, 2d Sess. Amino sent for, and received, a copy of the plans and specifications which required, generally, the excavation of a 3,948-foot segment of a cutoff channel for the Smoky Hill River to the south of the existing stream; transporting suitable excavated materials and materials from designated borrow areas to the site of the proposed levee; and utilizing these materials to construct a segment of flood control levees with an aggregate length of approximately 15,000 feet. The cover for these specifications was entitled, in part, "Flood-Protection Project, Kansas River Basin, Smoky Hill River, Kansas." The contract covered the construction of Section I of the cutoff channel; another section of the channel was to be completed under a separate, later contract.

3. The specifications contained a site investigation provision under its general conditions section. Amino decided to view the site and asked defendant's inspector at Barnard, Mr. Fred L. Wolfe, to accompany him on the auto trip to Salina, though he knew that Wolfe had only recently arrived in Kansas. When Amino told Wolfe he might bid on the job, Wolfe, who was sent to Kansas to be on the Salina project, told Amino that the project would be a very good job, money-wise, and also within the time required to build it. Wolfe had been with the Corps of Engineers over 31 years, 25 as an inspector, but he was not very familiar with the Salina area.

The two men visited the job site on January 12, 1957, after they had driven from Barnard to Salina, part of the way through dust storms caused by the drouth in the area.

4. During their visit to the site, which lasted approximately 2 hours, Amino and Wolfe did not stop to inspect the Smoky Hill River, which they twice crossed during their driving around Salina, nor did they discuss whether the job would be performed under wet or dry conditions. After twice stopping and leaving the car to inspect certain areas of the proposed excavation, they ate lunch and returned to Barnard. Amino visited the site on two other occasions prior to the award of the contract. Although Wolfe had been to Kanopolis Reservoir and knew of the gates at the dam, since it never ocurred to him that the operation of the dam would affect the site, he made no reference to the Kanopolis Reservoir to Amino during the trip. The Eng. BCA made no findings of fact with respect to the conflict in testimony taken at the Board hearing.

5. Kanopolis Reservoir contains an earth-filled dam which is approximately 34 road miles and about 85 river miles upstream from Salina, Kansas, on the Smoky Hill River. Completed in 1948, the reservoir pool inundates an area of 3,550 acres of land at its peak conservation level and 13,000 acres of land at its full pool elevation. Wide publicity is given to the recreational facilities and flood control aspects of the reservoir throughout the State of Kansas. Amino became aware that water was affecting operation under the contract, but he did not know how far the dam was from the work site and he did not inquire about the operation of the dam. The watershed above Kanopolis Dam contains a total drainage area of 7,860 square miles, 5,300 square miles of which is above Cedar Bluff Dam located at the Cedar Bluff Reservoir on the Smoky Hill River, 151 miles above Kanopolis Dam. Collected water is released at Kanopolis Dam via two controlled gates and an uncontrolled outlet. No water is discharged from the uncontrolled outlet until the conservation pool reaches 1,459 feet above mean sea level (m.s.l.), but

above that level, known as the flood control pool, the flow is automatically released and varies up to 1,300 cubic feet per second (c.f.s.) when the reservoir is filled to the top at elevation 1,508 feet above m.s.l. At 1,415 feet m.s.l. discharges are possible through the gated outlets; maximum outflow possible through the two controlled gates and the uncontrolled outlet for the top of the conservation pool at elevation 1,459 feet above m.s.l. is 4,200 c.f.s. and at the top of the flood control pool at elevation 1,500 feet above m.s.l. is 6,400 c.f.s.

6. The presence of the Kanopolis and Cedar Bluff Reservoirs was indicated on a map incorporated as part of the plans and specifications. Amino did not make inquiry of the officials or employees of the Corps of Engineers about possible effects of the reservoir on the job site, but he did talk rather casually with a few local (Salina) residents about expected weather conditions at Salina and the water flow in the Smoky Hill River. He estimated that 6 to 8 inches of rain would fall during the period of 90 working days which he estimated would be required for completion of the job.

7. The specifications which were part of the contract contained the following relevant provisions:

PART II

GENERAL CONDITIONS

* * * * *

GC-3. *Site Investigation.* The Contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of

equipment and facilities needed preliminary to and during prosecution of the work. The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to acquaint himself with the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available by the Government. The Government also assumes no responsibility for any understanding or representations made by its officers or agents during or prior to the execution of this contract, unless (i) such understanding or representations are expressly stated in the contract and (ii) the contract expressly provides that the responsibility therefor is assumed by the Government. Representations which are not expressly stated in the contract and for which liability is not expressly assumed by the Government in the contract shall be deemed only for the information of the Contractor.

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PART III

SPECIAL CONDITION

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SC-11. *Physical Data.* Information and data furnished or referred to below are furnished for information only and it is expressly understood that the Government will not be responsible for any interpretation or conclusion drawn therefrom by the Contractor.

* * * * *

b. Weather Conditions. Weather conditions at the site of the work are approximately as listed below,

but each bidder should satisfy himself before submitting his bid, as to the hazards likely to arise from weather conditions. Complete weather records and reports may be obtained from the U.S. Weather Bureau. For convenience, the following U.S. Weather Bureau summary is given for Salina, Kansas.

Month	Monthly temperature in degrees Fahrenheit					Monthly precipitation in inches		
	Extreme maximum	Mean maximum	Mean	Mean minimum	Extreme minimum	Maximum	Mean	Minimum
January	72	43	32	21	—23	3.45	0.69	T
February	81	47	36	24	—17	2.66	1.01	.27
March	91	57	45	32	—11	3.81	1.52	.13
April	95	70	57	44	12	7.09	2.36	.21
May	106	78	66	54	31	8.58	4.09	1.91
June	110	89	77	65	42	12.49	4.51	.28
July	116	96	83	70	53	10.72	3.16	.21
August	118	94	82	69	46	6.58	3.25	.32
September	110	85	72	60	34	9.43	3.20	.12
October	98	74	61	48	23	7.36	1.84	.19
November	82	56	45	34	1	3.93	1.24	0
December	81	46	35	25	—8	2.57	0.82	.02

Mean yearly temperature 58° F.

Mean yearly precipitation 27.69 inches.

Extremes and mean temperature and precipitation data compiled from reports for the period 1931–1952.

8. The Corps of Engineers customarily gives, on a regular basis, hydrographical information regarding releases of water from upstream dams to supplement low-water flow as an aid to navigation in contracts regarding structures on navigable rivers only. On non-navigable rivers, information regarding discharge of water by controlled gates into flood control channels is not regularly given if the only available hydrographical information covers a short span of years with weather conditions

which do not present a pattern of reservoir releases. In the area of Kansas along the Smoky Hill River there was a major flood in 1950, high discharges at the Kanopolis Dam from rains in May—July 1951 and then a period of 6 years of abnormally dry conditions preceding the date of this contract.

9. The dams on the Missouri River are not primarily flood control projects and, although partially based on rainfall, the releases from them for navigation purposes, for keeping sufficient depth of water flow in the river, are more easily predicted than are the flood control releases. Plaintiff had previously worked at Amazonia, Missouri, on the Missouri River in 1955 and received hydrographical[2] information, but had worked on a flood protection project at Barnard, Kansas, on the Salt Creek, and received none. The Smoky Hill River around Salina is not a navigable river and any discharges are primarily made for flood control.

10. Representatives of the Corps of Engineers who coordinated and prepared the plans for this contract possessed hydrographical information about Kanopolis Dam which covered a period of 6 or 7 years. This information was not included in the plans and specifications furnished contractors by the Corps of Engineers for the preparation of their bids on this contract because the Corps decided a 6-or-7-year period did not present a sufficient pattern of rainfall

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2. In the testimony there seems to be an implication that the terms "hydrological" and "hydrographical" are interchangeable, but they are not synonymous terms. Hydrological means pertaining to hydrology, i.e., a science dealing with the properties, distribution and circulation of water on the surface of the land, in the soil and underlying rocks, and in the atmosphere, but the term "hydrographic" relates to hydrography, which encompasses the description and studies of seas, lakes, rivers and other waters as to the measurement of flow and investigation of the behavior of streams, especially with reference to the control of their waters.

runoff necessitating reservoir releases affecting the Salina area to aid a contractor in scheduling his future work. It was thought this information would be more confusing than helpful to contractors who might bid on the project. Later, when plans and specifications were prepared for the second phase of work at the Salina project, hydrographs were included because of the existence of plaintiff's pending claim which was based, in part, on the lack of such information in his contract, although it was still thought such information might be misleading. Plaintiff had received such information about dams from the Corps of Engineers when it worked on a levees and burns project at Amazonia, Missouri, on the Missouri River in 1955, but had not received any information about dams in the specification for its work on the levee on Salt Creek at Barnard, Kansas, in 1956.

11. A reading of the plans and specifications, plus a view of the proposed work site, would obviously indicate that some method for transporting excavated materials across the existing river channel would be necessary. The specifications of the contract suggested and permitted the construction of a low-water crossing.

12. Plaintiff submitted its bid to perform the work at the fixed price of $202,316, based on anticipated costs of $155,000. This was $4,000 higher than the Government's "without profit" estimate and slightly below the second and third lowest bids. Plaintiff's estimate was based, in part, on the availability of a low-water channel crossing.

13. If the contractor had elected to use any method other than the low-water crossing for traversing the channel and provided for this method at the beginning of performance under the contract, the cheapest alternative method, strengthening an existing bridge, would have added substantial additional costs. However, this method could not be utilized later in the contract period after high-water

flows existed in the channel. It is apparent that any change to an alternative route would have increased costs. Plaintiff was required to bear the cost of any alternative methods which were covered by the following specification provisions:

> SC-20. *Operations on State and County Roads and City Streets.* The Contractor shall provide, at his expense, barricades, watchmen, flagmen, safety warnings, signs, and other safety measures for the protection of the public and road traffic during operations on state and county roads, or city streets. In the event any state and county roads or city streets are used as haul roads for the transportation of earth and slope protection materials, it shall be the responsibility of the Contractor to consult with local, county, and state authorities as to his responsibilities for maintenance, repair, and right-of-way. The Contractor shall further satisfy himself as to the maximum load limits of the bridges and his responsibilities thereof. The Government assumes no responsibilities for damage to existing roads, streets and bridges caused by the Contractors's operations.

14. Plaintiff was awarded the contract numbered DA-23-028-CIVENG-57-239 dated February 4, 1957. It contained the following standard provisions:

General Provisions

(CONSTRUCTION CONTRACTS)

* * * * *

3. CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its

performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed.

4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made,

the dispute shall be determined as provided in Clause 6 hereof.

5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

* * * * *

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided,* That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof.

6. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from

the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

* * * * *

In addition, the specifications of the contract contained the following Suspension of Work clause:

GC-11. *Suspension of Work.* The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense to the Contractor, no increase in the contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an adjustment in the contract price in the amount of the additional proper expense and modify the contract accordingly. An extension of time for the completion of the work in the event of any such suspension will be allowed the Contractor; provided, however, that the suspension was not due to the fault or negligence of the Contractor.

The Contractor was required to begin work within 10 days after notice to proceed and to complete all required work by August 15, 1957. The notice to proceed was dated February 14, 1957 and work was commenced on February 15, 1957.

15. The work proceeded on schedule and in late February, 1957, Amino asked Mr. Vincent Watson, the Corps of Engineers' Area Engineer and Wolfe's supervisor, who visited the job site 2 days a week about the possibility of cutting off the water at Kanopolis Dam to facilitate installation of a low-water crossing. Watson told Amino to write a letter to the Corps of Engineers making such a request and he would endeavor to ascertain if it could be done. By letter dated February 27, 1957, Amino requested that the water be cut off and Watson replied by letter dated March 1, 1957, stating that the controlled discharge would be reduced to 10 c.f.s. on February 28, 1957, held for an indefinite period of at least 1 week and also stating that the 10 c.f.s. discharge was required to satisfy prior commitments to water users downstream. The controlled discharge was reduced and plaintiff installed a channel crossing providing for 66.75 square feet of opening, which was slightly more than the required 64 square feet of opening.

16. Work contained on a regular basis until May 1957 when heavy rainfall began to hamper operations by causing work stoppage. The rainfall caused the water level of the river to rise and increased the river flow. By May 17, 1957, the plaintiff's channel crossing was being overtopped by water. The water level at the Kanopolis Reservoir rose and runoff of rainfall into the Smoky Hill River, plus uncontrolled discharges at the dam, increased the river flow to well above 2,000 c.f.s. which ultimately washed out the channel crossing on May 17, 1957. Small amounts of controlled discharges of water at Kanopolis also contributed to the river flow. A finding was made by the

Board that the operation of the gates of the dam during this period did not cause the washout.

17. Usually, when the controlled gates at the Kanopolis Dam were to be opened or closed, regulation orders were issued. An order was issued on May 15, 1957, to evacuate flood storage in the reservoir. Some regulation orders were issued during the period when plaintiff's channel crossing was out, but none of these orders was furnished to plaintiff or Wolfe at the work site. The Area Engineer, Watson, was never sent copies of the orders officially, but he did receive notice of some of the releases made in late May 1957, after the crossing was out. There is no evidence that a "regulation order" was issued relative to the closing of the gates in March when Amino put in the crossing. It thus appears that the gates were not closed by official order only. When Watson was not at the work site, he communicated indirectly with the permanent Government representative there via a twoway radio system. His office in Topeka, Kansas, would communicate daily by radio to Kanopolis Dam and leave messages for the site representative, who would communicate by radio to the dam twice a day to receive messages and report any unusual circumstances. The site representative was advised of gate operations once, in September 1957, after a second channel crossing had been installed.

18. Corps of Engineers' representatives at the dam began making large discharges of water through the controlled gates on or about May 20, 1957. This water took approximately 2 days to reach and affect the river flow at the work site at Salina. As the result of a conference held in early June 1957, and by working in conjunction with Government representatives, including Watson, who had established a regular pattern of visiting the work site, Mr. William L. Northrup, Chief of the Water Control Section of the Corps, computed that 250 c.f.s. was the approximate

maximum discharge from the dam which would permit the contractor to reinstall the crossing. From the middle of May until the end of August 1957, except for a few days in June, uncontrolled discharges from the dam greatly exceeded 250 c.f.s. Uncontrolled releases, during this period combined with local rainfall runoff, would have prevented reinstallation of the contractor's channel crossing even if the controlled gates had been closed. Since any effect the controlled discharges would have on river flows at Salina in the period in June is speculative, and a finding by the Board infers that controlled discharges did not prevent installation, it is a sound factual determination to conclude that controlled discharges prevented reinstallation only during the second idle period.

19. From information obtained at the June 1957 conference Northrup computed that the crossing, as originally installed, would be overtopped by discharges above 860 c.f.s. and any substantial increase in flow above 860 c.f.s. would destroy it. By utilizing records obtained for use at a hearing held before the Corps of Engineers Board of Contract Appeals on April 17, 1960, Northrup computed that the first crossing withstood a peak of 4,140 c.f.s. on May 11, 1957. Undoubtedly, the early peak weakened the crossing and contributed to its eventual destruction on May 17, 1957. Although no representative of plaintiff attended the June 1957 meeting, Northrup was furnished extensive information about the channel crossing and the height of the river from measurements obtained by Watson prior to the first washout.

20. As a result of the June 1957 conference and in answer to inquiries by Amino, the area engineer sent plaintiff the following letter dated June 14, 1957:

> Reference is made to your Contract No. DA-23-028-CIVENG-57-239, for Construction of Iron Avenue

Cutoff Channel, Levee, and Appurtenances, Section I, Salina, Kansas.

The river stage of the Smoky Hill River at Salina has been high the past few weeks due to the release of water from the Kanopolis Reservoir, as well as abnormally rainy weather.

For your information, Kanopolis will start closing their gates 13 June 1957. The river should stabilize at Salina on or about 18 June 1957. Adverse weather conditions could change the closure schedule, but not for any appreciable length of time.

It is requested that you resume construction operations as soon as possible when ground conditions permit.

The gates were closed on June 16, 1957, but were reopened on June 22, 1957. Plaintiff was advised orally, by Watson, that continued adverse weather conditions necessitating reopening the gates could prolong any stabilization of the river flow.

21. From May 17, 1957, to September 5, 1957, some work was done at the site, but the absence of a channel crossing delayed the excavation work since the materials could not be transported across the river. Plaintiff's work was also impeded by a strike of the operating engineers from May 27 to June 13, 1957, which was settled when plaintiff thought full-scale work would soon resume. Defendant's agents impeded performance under the contract and also demonstrated an unreasonable lack of cooperation with the contractor.[3]

22. On August 31, 1957, the controlled gates at Kanopolis were closed and plaintiff was able to install a sec-

3. Defendant's brief before the Board identified the period of interruption to be from May 16 to October 14, 1957.

ond channel crossing on September 5, 1957. This crossing contained three pipes and provided for 105 square feet of opening. It was successfully used for hauling excavated materials until September 15, 1957.

23. On September 15, 1957, the river flow washed out a section of the crossing topping, but this minor damage was repaired in a few hours. Because of a misunderstanding concerning the information given over the radio to headquarters, which was relayed to managers at the dam, it was assumed by defendant's employees at the dam that the crossing had been washed out. A decision was then made to release some accumulated water at the rate of 2,200 c.f.s. The next morning, when the area engineer learned that the crossing had been repaired, he called the dam to stop the opening, but was informed it was too late because the water was already on the way. Officials at the work site were informed of the gate opening and plaintiff removed the crossing to save the pipes for later use. Had plaintiff not removed the crossing, it wold have been destroyed by this continuing surge of water.

24. Weather conditions were good from September 16, 1957, until the reinstallation of the second crossing on October 15, 1957, but the loss of the crossing and the delay in its reinstallation, caused by the controlled discharge at Kanopolis, hampered work at the site. With the second crossing reinstalled, work continued and was substantially completed before Christmas 1957, except for seeding and surfacing which was completed in the spring of 1958.

25. By Modification No. 3, May 31, 1957, plaintiff was allowed 26 days because "it has been determined that delay in the performance of said contract was due to causes beyond your [plaintiff's] control and without your fault or negligence, namely, abnormal weather within the period

21 March to 20 May 1957, inclusive." Modification No. 10, August 9, 1957, extended the contract period 45 days because of delay "due to causes beyond your control and without your fault or negligence, namely, strikes, abnormal weather conditions, high water in the Smoky Hill River, and acts of other contractors in performance of contracts with the Government within the period 21 May 1957 to 20 July 1957, inclusive." Modification No. 15, November 19, 1957, extended the contract period 70 days because of delay "due to causes beyond your control and without your fault or negligence, namely, high water in the Smoky Hill River and abnormal weather conditions within the period 21 July 1957 to 16 October 1957, inclusive." Modification No. 18, April 23, 1957, extended the contract 72 days because of delays "due to causes beyond your control and without your fault or negligence, namely, abnormal weather and ground conditions resulting therefrom within the period 17 January to 1 April 1958."

These extensions of time saved the contractor from the imposition of liquidated damages. They did not involve any adjustment in the contract price or reduce costs of performing the contract under adverse conditions.

Recommended Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. The amount of recovery is reserved for further proceedings under Rule 47(c).

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

No. 158-62

(Decided February 17, 1967)

AMINO BROTHERS COMPANY, INC.

vs.

THE UNITED STATES

John A. Biersmith, attorney of record for plaintiff. *Rafter, Biersmith & Walsh,* of counsel.

Frances L. Nunn, with whom was *Assistant Attorney General Barefoot Sanders,* for defendant.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

Opinion

SKELTON, *Judge,* delivered the opinion of the court: *

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*This opinion contains all necessary findings of fact. The court acknowledges the helpfulness of the recommended opinion prepared, at its direction, by Trial Commissioner Paul H. McMurray, although we reach different legal conclusions as to some of the issues in the case.

In this case, the plaintiff sues to recover damages in the sum of $301,530 incident to two washouts of a low-water crossing and the delay of work resulting therefrom. It claims entitlement to such amount as an equitable adjustment under the "Suspension of Work" and "Changed Conditions" clauses of a contract which it executed with the United States Army Corps of Engineers for the construction of a flood control project, and as damages for an alleged breach of such contract. The defendant interposed the sovereign act doctrine, and the finality of findings of fact determined in its favor by the Corps of Engineers Board of Contract Appeals (hereinafter referred to as the "Board") under the "Disputes" clause of the contract. Before reaching the merits of the claim, we face a threshold procedural inquiry which necessitates relating the chronology of the administrative and judicial proceedings in this case.

Plaintiff's claim was denied by the contracting officer and ultimately by the Corps of Engineers Board of Contract Appeals in a written opinion dated April 18, 1961 (Eng. BCA No. 1582). Plaintiff's motion for reconsideration and/or rehearing was denied on January 25, 1962 (Eng. BCA No. 1582). Thereupon, plaintiff filed his petition in this court on May 14, 1962, and on June 9, 1964, the defendant's motion for an order restricting the trial to a review of the record of the Board was denied by the trial commissioner. The defendant appealed within the procedures for review afforded it by Rule 55(a) (3),[1] but we denied defendant's request for review, without prejudice, on July 29, 1964, and the case was scheduled for a de novo trial. The report of the commissioner was rendered on March 25, 1966, after a de novo hearing, accompanied by his findings of fact.

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1. No question concerning waiver by the defendant has been raised.

We wish to point out that our denial of the defendant's request for review without prejudice, and the hearing before the commissioner was prior to the decisions of the Supreme Court in *United States* v. *Utah Construction Co.*, 384 U.S. 394 (1966), and *United States* v. *Anthony Grace & Sons*, 384 U.S. 424 (1966), and we and the commissioner did not have the benefit of those decisions. In view of the holding in those cases, we recognize that we are bound by the Board's findings of fact if they are supported by substantial evidence, and we hold that they are, and that our decision must be, and is accordingly, based thereon.

We feel, however, that in view of the opinion of the parties and the commissioner to the effect that the evidence adduced at the trial de novo was the same as the evidence presented to the Board, it would not be productive to undertake the laborious task of searching each and every subsidiary finding to ascertain whether it is supported, or can be supported, solely on evidence presented to the Board. Since our conclusions and critical findings all rest upon the Board proceedings and the judicial record, it is unnecessary to engage in the useless and burdensome process of combing each of the preliminary findings. *Cf. Hunt and Willett, Inc.* v. *United States*, 168 Ct. Cl. 256, 260, 351 F. 2d 980, 982 (1964).

The facts giving rise to plaintiff's complaint are as follows:

Plaintiff, a corporation and a general contractor, experienced in flood control work, entered into a contract with the United States Army Corps of Engineers on February 4, 1957, to build a cutoff channel and to construct a flood control levee for the total sum of $202,316 on the Smoky Hill River at Salina, Kansas. The contract required the plaintiff to make an excavation of 3,948 feet and to use the excavated materials to construct a flood control levee

of approximately 15,000 feet. This construction required that the excavated materials be transported across Smoky Hill River. The contract provided that the plaintiff "may construct for his own use" low-water crossings on the Smoky Hill River as follows:

* * * * *

2-13. *Channel Crossings.* The Contractor may construct for his own use within the right-of-way, low water crossings on the Smoky Hill River in strict accordance with the following:

a. Provide for not less than 64 square feet of effective opening in the channel at each crossing.

b. The flow line of the openings shall be set at the flow line of the existing channel.

c. The Contractor shall remove the crossings whenever in the opinion of the Contracting Officer the river stage would be adversely affected.

d. The crossings shall be used for the sole purpose of the Contractor's hauling equipment.

e. The Contractor shall remove the crossings upon completion of the work or whenever its use is no longer required.

* * * * *

The specifications which formed a part of the contract contained a clause showing approximate weather conditions at the site with monthly precipitation in inches, but proviidd that:

* * * each bidder should satisfy himself before submitting his bid as to the hazards likely to arise from weather conditions. Complete weather records and reports may be obtained from the U.S. Weather Bureau.
* * *

Such specifications also contained a provision with reference to site investigation which stated that the con-

tractor had satisfied himself as to the nature and location of the work, the general and local conditions, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site.

The contract contained "Suspension of Work", "Changed Conditions" and "Disputes" clauses usually found in government contracts of this kind.[2]

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2. *"Suspension of Work.* The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the government. Unless such suspension unreasonably delays the progress of the work and causes additional expense to the Contractor, no increase in the contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an adjustment in the contract price in the amount of the additional proper expense and modify the contract accordingly. An extension of time for the completion of the work in the event of any such suspension will be allowed the contractor; provided, however, that the suspension was not due to the fault or negligence of the Contractor.

"Changed Conditions. The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be

The title pages of the specifications of this project were headed by the words, "Flood-Protection Project, Kansas River Basin, Smoky Hill River, Kansas." It appears from the evidence that during the 6 years immediately preceding the beginning of this project there had been a severe drought along this part of the river, although in 1950, about 6 years before plaintiff started work on this contract, there had been a disastrous flood along Smoky Hill River where plaintiff was required to work under the contract involved here.

Also, there was a flood control dam, known as Kanopolis Dam, located 88 miles upstream from the work site, and several miles further upstream was Cedar Bluff Dam. Both of these dams were being operated by the United States Army Corps of Engineers as flood control dams

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made, the dispute shall be determined as provided in Clause 6 hereof.

"*Disputes.* Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

and the Kanopolis Dam was built primarily for flood control purposes. Water was retained in these reservoirs during periods of excessive rain and as conditions permitted, flood waters were released until the flood storage capacity of the reservoirs was restored. The Reservoir Regulation Manual of the United States Army Corps of Engineers for operating the Kanopolis Reservoir required the release of water from the dam at certain specified rates of flow when the water reached designated levels in the reservoir. The District Engineer of the United States Army Corps of Engineers made the decisions from time to time as to when water should be released through the dam in operating it for flood control purposes.

In addition, there was an uncontrolled outlet in the dam which was called the "uncontrolled notch", which allowed water to escape through the dam at various rates of flow when the water level exceeded 1,459 ft. mean sea level. There was no way of controlling flows through the uncontrolled notch when water exceeded this level in the reservoir. Furthermore, the drainage area between the Kanopolis Dam and the work site encompassed 368 square miles and there was no way of controlling the run-off in this area during times of heavy rainfall

The plaintiff knew from drawings and maps that were furnished to it in connection with the bidding and execution of the contract that the Kanopolis Dam was located 88 miles above the work site and that it was being operated as a flood control dam.

Plaintiff constructed a low-water crossing across Smoky Hill River and used it to haul excavated material across the river from March 6, 1957, through May 11, 1957. Heavy rains occurred on or about the latter date, and on or about May 17, 1957, the high water in the river caused by the heavy rains washed out the low-water crossing.

The evidence showed that the low-water crossing would be washed out when the flow in the river reached 860 cubic feet per second (c.f.s.) and that it could not be rebuilt until the flow of the river was reduced to 250 c.f.s. On May 17, 1957, when the low-water crossing was washed out, the flow of the river reached 2,930 c.f.s., most of which came from the natural runoff in the 368-square mile drainage area between the Kanopolis Dam and the work site. The records of the Army Engineers showed that at that time only 500 c.f.s. of water, controlled and uncontrolled, came from the Kanopolis Dam and of this amount, only 200 c.f.s. of water came from the operation of the floodgates at the dam. Accordingly, it was clearly established and is uncontroverted that the first washout of the low-water crossing was caused by the natural run-off between the Kanopolis Dam and the work site, and that the operation of the floodgates at the dam by defendant had nothing to do with it.

Heavy rains upstream from the Kanopolis Dam continued from May 17, 1957, until September 5, 1957, when the flow in the river was reduced sufficiently to enable the plaintiff to rebuild the low-water crossing, which was done. Plaintiff used the second low-water crossing from September 5, 1957, to September 14, 1957, when the rains began again, and on the latter date the flow of the river at the crossing reached a peak of 837 c.f.s. which caused the loss of some of the topping on the crossing. This loss was not due to the operation of the flood gates at the Kanopolis Dam, because they had been completely closed since August 31, 1957. However, on September 16, 1957, the local engineer of the United States Army Corps of Engineers at the work site notified the District Engineer who was in charge of operating the floodgates at the Kanopolis Dam for flood control purposes that the plaintiff's low-water crossing had been washed out the second

time. The District Engineer issued orders to open the floodgates at the Kanopolis Dam to increase the discharge of water to 2,200 c.f.s. The local engineer learned that he had acted on erroneous information, and that plaintiff's crossing had not been washed out completely but only that the surface had been damaged, and it had already been repaired by the plaintiff. He communicated again with the District Engineer in an attempt to stop the release of any water through the floodgates at the Kanopolis Dam, but was told that the water had already been released and was flowing down the river toward plaintiff's crossing. The flood water in the reservoir had reached such a high stage it was necessary to release water from the dam in its operation as a flood control dam for the protection of the dam and life and property downstream.

The plaintiff, upon learning that the water was coming down the river, voluntarily removed parts of the crossing which could be salvaged before the water reached it. In due time, the water reached the crossing and completely washed it out on September 19, 1957. At that time the discharge of water through the control gates at the Kanopolis Dam was 1,230 c.f.s. and was without doubt the major cause, if not the sole cause, of washing out plaintiff's low-water crossing the second time.

High rains continued from September 18, 1957, to October 4, 1957, when plaintiff was able to again rebuild his low-water crossing and finish the work under the contract. By various modification orders issued by the defendant. the plaintiff was allowed sufficient additional time within which to finish the contract without having to pay any liquidated damages, but such modification orders did not provide any adjustment in the contract price or reduce costs of performing the contract under the conditions set out above.

The plaintiff contended before the Board that it was entitled to damages because defendant misled it by various statements made, writings furnished, and information withheld by defendant's representatives at the time the contract was signed. This was with reference to rainfall, floods, stages of the river, operation of the Kanopolis Dam as a flood control dam and its effect on the work site operations of the plaintiff. The Board found facts on these points (which findings are not listed in detail here), which were supported by substantial evidence, and were against the plaintiff. It correctly held that plaintiff was not entitled to recover on such contentions.

The plaintiff also claimed before the Board that it was entitled to the damages sought as an equitable adjustment of the contract price by reason of the "Suspension of Work" and "Changed Conditions" clauses of the contract in view of the two washouts of its low-water crossing and the delays caused thereby.

The Board found with respect to the first washout that it was caused solely by heavy rainfall and natural run-off of uncontrolled flood waters from the 368-square mile drainage area between the Kanopolis Dam and the crossing, and that defendant's operation of the dam did not in any way contribute to it. This was clearly an Act of God for which defendant could not be responsible. It did not require the contracting officer to issue a suspension of work order within the meaning of the contract provisions because such acts of nature were not "necessary or desirable for the convenience of the Government," and were completely beyond the control of such officer and the defendant. The defendant was not an insurer for plaintiff against acts of nature. *Banks Construction Co.* v. *United States*, 176 Ct. Cl. ....., ..., 364 F.2d 357, 367 (1966).

Neither was the first washout a changed condition within the meaning of the contract so as to entitle plain-

tiff to any relief. The Board found that plaintiff was experienced in flood control work and was actually engaged on a flood control project on Smoky Hill River where a disastrous flood had occurred six years before. It also found that: (1) the specifications for this contract bore the words "Flood-Protection Project– Smoky Hill River, Kansas"; (2) plaintiff was in fact building a flood control levee with excavated materials; and (3) plaintiff knew of the existence of the Kanopolis Dam and that it was being operated as a flood control dam. Furthermore, it was required by the contract to satisfy itself as to rainfall, river stages, site conditions, and weather. Under these facts, plaintiff should have reasonably anticipated that rains would fall and floods would occur on the river which would have an effect on the river stages at the location of its low-water crossing. Therefore, we hold that the floods which caused the first washout were not "changed conditions" within the meaning of the contract, but were a part of the hazards of the undertaking which plaintiff assumed when it signed the contract.

The second washout of plaintiff's low-water crossing was caused by an entirely different set of circumstances. The Board found that the District Engineer of defendant opened the flood gates of the Kanopolis Dam while under the mistaken belief that rains had already washed out plaintiff's crossing, and that such flood waters so released was the sole cause of the second loss of the crossing. However, it was established that the level of the water in the reservoir was so high it was necessary for the flood waters to be released. These facts were not controverted by the plaintiff and must be accepted as final. It is our opinion that the defendant released the water in accordance with its own regulations and as a part of its duty to the public to operate the dam as a flood control project to protect the dam and lives of people and their property located downstream from the dam.

We hold that the defendant in releasing the water from the Kanopolis Dam which caused the second washout of plaintiff's crossing was acting in its sovereign capacity and that its action in so doing, affected the public generally and was not directed solely toward the plaintiff. It has long been held that the United States as a contractor cannot be held liable directly or indirectly for public acts of the United States as a sovereign. *Horowitz* v. *United States,* 267 U.S. 458 (1925); *Anthony P. Miller, Inc.* v. *United States,* 161 Ct. Cl. 455 (1963), *cert. denied,* 375 U.S. 879; *Bateson-Stolte, Inc.* v. *United States,* 158 Ct. Cl. 455, 305 F.2d 386 (1962); *J. B. McCrary Co.* v. *United States,* 114 Ct. Cl. 12, 84 F. Supp. 368 (1949); *Jones* v. *United States,* 1 Ct. Cl. 383 (1865).

The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act. *Gerhardt F. Meyne Co.* v. *United States,* 110 Ct. Cl. 527, 76 F. Supp., 811 (1948); *Sunswick Corp.* v. *United States,* 109 Ct. Cl. 772, 75 F. Supp. 221 (1948), *Cert. denied,* 334 U.S. 827.

This requires us to decide whether or not the defendant promised in the contract that it would do no sovereign act that would hinder the plaintiff in the execution of the contract. Certainly, there was no express promise by the defendant in the contract that it would not release any water from the Kanopolis Dam in operating it as a flood control project, nor do we believe there was any implied promise by defendant that it would not do so.

Plaintiff argues that the provision in the contract stating that the plaintiff "may construct for his own use * * * low water crossing * * *" in accordance with certain specifications amounted to an implied promise or guarantee

on the part of the defendant that the low-water crossing if constructed would always be there for the use of the plaintiff, and that if destroyed, the defendant would pay the consequent damages for such destruction. We do not so interpret the contract. The contractor had a choice of building a low-water crossing or a high-water crossing, or of devising some means of transferring the excavated material across the river other than by the use of a low-water crossing. We find nothing in the contract that could be said to be an express or implied promise, on the part of the defendant that it would not perform any sovereign act, such as the release of the water from the Kanopolis Dam, which would preclude use by the plaintiff of the low-water crossing or hinder it otherwise in the performance of its contract.

We find it unnecessary to pass upon the question of whether the plaintiff is entitled to an equitable adjustment of the price of its contract by reason of its provisions pertaining to "Changed Conditions" and "Suspension of Work", with respect to the second washout of the crossing, since the absence of a promise by the Government, express or implied, that it would not exercise a sovereign power which would hinder the plaintiff in the execution of its contract, precludes any recovery by the plaintiff because of the sovereign act doctrine. We also conclude that it is unnecessary to consider the applicability of the Act of May 15, 1928, 45 Stat. 535, 33 U.S.C. §702c (1964),[3] as a defense to plaintiff's suit in light of the foregoing disposition of the issues in this case. Accordingly, plaintiff is not entitled to recover and the petition is dismissed.

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3. This section provides in pertinent part: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: * * *."

Conclusion of Law

Upon the foregoing opinion which includes therein the findings of fact made by the court as a part of its judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and its petition is therefore dismissed.

APPENDIX C

HEADQUARTERS
DEPARTMENT OF THE ARMY
Office of the Chief of Engineers
Washington 25, D.C.

(Seal) In reply refer to

Before the Corps of Engineers Board of Contract Appeals

Appeal of AMINO BROTHERS COMPANY Under Contract No. DA-23-028-Civeng-57-239	Eng BCA No. 1582

Appearances for the Appellant: Madden and Burke, Attorneys at Law. By: John A. Biersmith, Jr., Esq., Cyrus W. Long, Esq., Robert Wald, Esq.

Appearances for the Government: Clarence H. Miller, Esq. Omaha, Nebraska, Gilbert J. King, Esq. Kansas City, Missouri.

Opinion by Mr. Rowe

This timely appeal is from the Contracting Officer's denial of a claim for costs caused by high river stages at the work site. The appellant maintains that the high river stages were caused by the operation of the Kanopolis Reservoir which is approximately 88 miles upstream from the work site. The appellant seeks to hold the Government responsible on the ground that the Corps of Engineers operated the reservoir in such a manner as to hinder the performance of the contract.

As a basis for recovery of the alleged extra costs the appellant cites General Condition GC-11, SUSPENSION OF WORK and General Provision 4, CHANGED CONDITIONS.

The parties have agreed, with the concurrence of this Board, to limit the hearing to substantive issues involved without regard to the quantum of the claim.

The contract provides for the excavation of a 3,948-foot segment of a cutoff channel for the Smoky Hill River at Salina, Kansas, and the utilization of suitable excavated materials, plus materials from designated borrow areas, in the construction of segments of flood control levees with an aggregate length of 15,010 feet.

The work performed under this contract was particularly vulnerable to an increase in cost if river stages exceeded a certain minimum because (1) most of the material to be used for the construction of levees had to be hauled across the Smoky Hill River and the most practicable and economical route for such haul was by means of a temporary low water crossing which could not be constructed or maintained except during periods when the Smoky Hill River was low and (2) the work included the excavation of a new channel directly connected with the river. Since the new channel was designed to be deep enough to accommodate the flows of the river in place of the old channel, it is obvious that water from the river would enter the new channel at any time the river exceeded a certain minimum stage unless some obstruction was provided.

It is clear that the appellant recognized, prior to the preparation of its bid that its costs would be increased in the event that the river stages were high. (Tr. pp. 12, 19 and 39). By "high" we do not mean flood stage. For

example, a sustained flow in excess of 860 cubic feet per second (c.f.s.), which is less than 25% of minimum flood stage, was actually sufficient to have caused the appellant substantial delays. (See Tr. p. 75 and page 8 of this opinion).

The Government asserts that it was the appellant's responsibility to make an adequate investigation and that if the facts available to the appellant had been properly considered it would have recognized that unfavorable river stages might reasonably be expected. The Government cites the following in support of this assertion:

> (1) GC-3. *Site Investigation.* The contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, . . . roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, ...
>
> (2) The words *"Flood-Protection Project, Kansas River Basin, Smoky Hill River, Kansas"* are a part of the titles of the plans and specifications.
>
> (3) SC-11. *Physical Data.* . . .
>
> *b. Weather Conditions.* Weather conditions at the site of the work are approximately as listed below, but each bidder should satisfy himself before submitting his bid, as to the hazards likely to arise from weather conditions. Complete weather records and reports may be obtained from the U. S. Weather Bureau. For convenience, the following U. S. Weather Bureau summary is given for Salina, Kansas.

Month	Monthly temperature in degrees Fahrenheit					Monthly precipitation in inches		
	Extreme maximum	Mean maximum	Mean	Mean minimum	Extreme minimum	Maximum	Mean	Minimum
January	72	43	32	21	—23	3.45	0.69	
February	81	47	36	24	—17	2.66	1.01	.2
March	91	57	45	32	—11	3.81	1.52	.1
April	95	70	57	44	12	7.09	2.36	.2
May	106	78	66	54	31	8.58	4.09	1.9
June	110	89	77	65	42	12.49	4.51	.2
July	116	96	83	70	53	10.72	3.16	.2
August	118	94	82	69	46	6.58	3.25	.3
September	110	85	72	60	34	9.43	3.20	.1
October	98	74	61	48	23	7.36	1.84	.1
November	82	56	45	34	1	3.93	1.24	
December	81	46	35	25	—8	2.57	0.82	.0

Mean yearly temperature 58° F.

Mean yearly precipitation 27.69 inches.

Extremes and mean temperature and precipitation data compiled from report for the period 1931–1952.

. . .

Without deciding at this point whether the appellant's optimism was justified, we are satisfied that it did anticipate low river stages. Mr. Amino, appellant's president, testified that had he known that the river stages would be unfavorable, the bid would have been substantially higher. (Tr. pp. 9, 47, and 48). This testimony is supported

by the fact that the appellant did not take full advantage of the low water stages which prevailed at the time work was commenced. Had the appellant expected difficulties in maintaining the crossing, we are satisfied that it would have commenced with the work which required use of the crossing. Furthermore, the appellant did not leave any obstruction at the point where the old river channel and the new river channel joined and, naturally, when the water in the Smoky Hill River rose it entered the new channel. The appellant did not offer any satisfactory explanation as to why an obstruction was not left and we conclude that it did not provide for such protection because it expected low river stages.

Favorable river stages prevailed from the date of commencement of the work (13 February 1957) to 17 May 1957 and after 4 October 1957. However, during the period 17 May 1957 to 4 October 1957, the river stages were such that the appellant was unable to maintain a low water crossing, except for a period of seven days in September. As a result the work was stopped except for a minor amount of construction not involving the use of the crossing. In addition to costs which the appellant attributes to the work stoppage, it alleges that it suffered increased costs because of the inundation of the work site and the resultant saturation of the soil.

The appellant and the Government are in sharp disagreement as to the cause of the high water. The Government asserts that the high river stages were caused by higher-than-average precipitation in the drainage basin of the Smoky Hill River and that, had it not been for the operation of Kanopolis Reservoir, flooding of the work site would have been much more severe. The appellant asserts that the high river stages were the result of the opening of the gates at the Kanopolis Dam at a time when the

Government knew that such gate openings would adversely affect the appellant's operations.

It is readily apparent that both the appellant's and the Government's allegations as to the cause of the high river stages could, under some circumstances, be correct. Obviously, had precipitation in the Smoky Hill River Basin been slight there would have been no substantial quantities of water for the Government to release. It is equally obvious that by operation of the gates the flow of water downstream can be either increased or decreased within certain limits.

Before entering into a detailed discussion of the evidence adduced by each party in support of its position we consider it necessary to set forth certain background information pertaining to the purpose and operation of the Kanopolis Reservoir.

As indicated above, Kanopolis Dam is approximately 88 miles upstream from the work site. Several miles further upstream is the Cedar Bluff Dam. The Cedar Bluff Dam was initially designed for the purpose of irrigation but was subsequently adapted for flood control. Kanopolis Dam was built primarily for flood control purposes. Kanopolis Dam, of course has a more direct effect on the river stages at the work site than does Cedar Bluff Dam. This doubtless accounts for the fact that neither party made any mention of the operation of the Cedar Bluff Dam except for the above general background information which was furnished by the Government.

Water is retained in the reservoirs during periods of excessive flows and, when conditions permit, the accumulated flood waters are discharged as fast as possible in order to restore the flood storage capacity of the reservoir. The Reservoir Regulation Manual for Kanopolis Reservoir (Ex-

hibit 21 to Contracting Officer's Findings of Fact) provides for the following water storage zones:

Conservation Pool	Up to elevation 1459.0 ft. m.s.l.
ZONE I—Flood Control Storage	Elevations 1459 to 1487.3. Water to be released at a rate not to exceed 3,000 c.f.s. at Salina, Kansas
ZONE 2—Flood Control Storage	Elevations 1487.3 to 1508. Water to be released at a rate not to exceed 4,600 c.f.s. at Salina, Kansas
Above 1508	The spillway (uncontrolled) comes into operation at elevation 1508. The spillway is designed to discharge up to 172,400 c.f.s.

In addition to the uncontrolled spillway, the dam contains a smaller uncontrolled outlet (the "uncontrolled notch") which comes into operation when the reservoir exceeds 1459. The amount of water which is automatically discharged through this uncontrolled notch increases as the elevation of the reservoir is raised. For example at elevation 1460 the uncontrolled discharge is 14 c.f.s., at elevation 1476 the uncontrolled discharge is 1086 c.f.s., and at elevation 1508 the uncontrolled discharge is 1300 c.f.s. (Tr. p. 1640 and page 8, Exhibit 9, Item 1 to Contracting Officer's Findings of Fact). It is obvious that the reservoir was not constructed for the purpose of maintaining absolute control of waters to be discharged since no means was provided for controlling the flows through the uncontrolled notch. The ability to effect absolute control of flows at Salina, Kansas (i.e. the work site) is further reduced by the fact that there is no means of controlling the runoff from the 368-square-mile drainage area between the dam and the work site.

Competent and uncontroverted evidence established the mean daily average of the volume of water flowing into

the Reservoir, the day to day elevations of the Reservoir (based on readings each midnight), the mean daily discharges from the dam, both controlled and uncontrolled, and details as to the opening and closing of the gates at Kanopolis Reservoir. (See Exhibit 11, Items 1 through 14, and Exhibit 13, Contracting Officer's Findings of Fact; Government Exhibit A; and Tr. pp. 140 through 145). No record was kept by either the appellant or the Government of the river stages at the site of the work. However, several months prior to the time of the hearing before this Board, the Government made available to the appellant a record of the average daily discharges at Mentor, Kansas, which is only 10 miles upstream from the work site. (See Exhibit 13, Contracting Officer's Findings of Fact.) The data pertaining to the river stages at Mentor were based on records maintained by the Department of Interior, Geological Survey, in the regular course of business and afford us a reasonable basis for determination of the volume of water at the work site.

The record clearly supports the Government in its contention that the work site was protected from severe flooding by the operation of the Kanopolis Reservoir. The records of the inflows into the Kanopolis Reservoir throughout the period of the claim (17 May 1957 to 4 October 1957) are generally high. During that period a number of peak flows occurred which, had the flood waters not been retained in the reservoir, would have undoubtedly caused stages at the work site substantially in excess of any stages which actually occurred. (See Government Exhibits A and B and Tr. p. 150). The fact that these higher-than-average inflows were retained and released at a later time had various effects on the river stages at the work site. The effect which the Government emphasizes is that the stages were controlled within limits so as not to cause flooding at Salina,

Kansas and thus protected the work site. The appellant, however, points to the fact that while the accumulated flood waters were being discharged it was prevented from carrying on full-scale operations.

Since the appellant seeks to hold the Government responsible for the consequences of the opening of the gates, we have reviewed the records to determine if the opening of the gates did actually delay the appellant or otherwise increase its costs. It is possible for us to arrive at a conclusion on this issue with respect to some of the gate openings. With respect to others, however, we find the record before us inadequate. It is possible to calculate with reasonable accuracy the effect at the project site when a gate is first opened because we have available to us the quantity of water which was being discharged through the uncontrolled notch, the quantity of water which was released by the gate, and the quantity of water at Mentor. However, we find it impracticable to carry this calculation forward over any substantial period of time because we are unable to calculate, from the data available to us, what the reservoir elevation would have been had the gates remained closed in an attempt to maintain a flow of water at the work site of 860 c.f.s. or less. It is clear that under some circumstances it is physically impossible to maintain such a rate of flow at Salina. Not only is there no means of controlling the flow of water from the 368-square mile drainage area between the dam and the work site but the very act of closing the gates at a time when the inflows into the Reservoir exceed the outflows causes the elevation of the reservoir to rise and this in turn increases the flow through the uncontrolled notch. If such a practice were to be continued under those same conditions, the elevation would reach the point where water would also escape over the spillway. It is not improbable that had the Government

attempted to maintain a flow sufficiently low to meet the appellant's need without considering the over-all problem, the net result would not have been beneficial to the appellant.

With the above facts in mind, we consider the specific instances that the appellant cites in support of its allegation that it was damaged by the gate operation. The first period of delay which the appellant attributes to the operation of the reservoir commenced when the first river crossing was lost.

This crossing, which was constructed on 6 March 1957, consisted of an earth fill providing a roadway 16 feet in width across the Smoky Hill River immediately upstream from the junction of the old and new river channels. At the point where the fill crossed the river channel, two corrugated metal pipes had been placed to permit the passage of water. These pipes provided an opening of 66.75 square feet which was slightly in excess of the 64-sq. foot minimum opening required by the contract. The parties are in agreement that the opening provided by the appellant would permit the passage of water at the rate of 860 c.f.s. (See para. 40 of Contracting Officer's Findings of Fact and para. 40 of appellant's Concurrence in and Exceptions to Findings of Fact.) Accordingly, any peak flow which substantially exceeded 860 c.f.s. or any sustained flow which exceeded 860 c.f.s. would cause the crossing to be overtopped and destroyed. (See Tr. p. 75.)

The appellant used this crossing from 6 March 1957 through 11 May 1957. No work was performed from 13 May 1957 through 22 May 1957 because of heavy rains and wet ground conditions. During this period high river stages caused the loss of the crossing. To determine whether the loss was caused by releases of water from the Kanopolis Reservoir, it is first necessary to determine the

date of loss. This date cannot be established by direct evidence since no one was present when the crossing was destroyed. However, the records of the discharges at Mentor indicate upon what date the discharges first exceeded 850 c.f.s. and thus furnish a reasonable basis for determination of the actual date of loss. When those records are considered together with the records of the inflows into and discharges from Kanopolis Reservoir, it is also possible for us to determine the cause of the loss. The pertinent data are tabulated below. The data have been arranged to allow for the 2-day lag between the release of water at the dam and its arrival at Mentor.

Date May 1957	Discharge at Mentor in c.f.s.	Date May 1957	Mean Discharge at Kanopolis in c.f.s. Controlled	Uncontrolled	Elevation of Reservoir
11	766	9	0	95	1,461.96
12	557	10	0	110	1,462.57
13	510	11	0	121	1,462.70
14	638	12	0	147	1,463.18
15	826	13	0	185	1,464.23
16	736	14	0	260	1,465.70
17	2,930	15	120*	380	1,466.69
18	2,800	16	120*	500	1,468.25
19	882	17	0	620	1,470.90
20	798	18	0	790	1,472.20
21	800	19	0	900	1,472.63
22	840	20	0	940	1,473.06
23	1,190	21	350**	980	1,473.30
24	1,700	22	890	960	1,473.05

*One gate at Kanopolis was opened one foot for 15½ hours which permitted a discharge of approximately 220 c.f.s. during that 15½ hour period. (See Tr. p. 167).

**Gates were opened progressively to a maximum of 2 gates 1.90 feet by 22 May and closed 24 May. (See Govt. Exhibit A).

Upon examination of the preceding table it is apparent that the rate of flow at Mentor on 17 May 1957 was

sufficient to have destroyed the crossing. Selection of this date is consistent with Mr. Amino's testimony that one of his employees told him that the crossing had already been washed out when the employee viewed the site on 21 May 1957. On that date the average flow at Mentor was 2,930 c.f.s. Most of the water was the result of natural runoff from the 368-square mile drainage area between Kanopolis Dam and the Mentor gage because the discharge at the dam, controlled and uncontrolled, amounted to only 500 c.f.s. (Tr. p. 169). Mr. William L. Northrop, a qualified engineer with long experience in hydrology (Tr. pp. 137 and 138) testified that the effect of the operation of the gates on the volume of water which reached Mentor on those dates would not exceed 200 c.f.s. (Tr. p. 167). On the basis of the evidence outlined above, we find that the loss of the appellant's crossing on 17 May 1957 was not due to the operation of the Kanopolis Reservoir.

Having lost the crossing, the appellant was faced with the problem of constructing a new crossing in order to resume full scale operations. This could not be done unless the river receded to a comparatively low stage—250 c.f.s. according to testimony by Government personnel (Tr. p. 190) which was not controverted by the appellant. It is obvious that as long as the elevation of the reservoir remained substantially higher than the sill of the uncontrolled notch a discharge of only 250 c.f.s. or less could not be attained. The Government personnel who were responsible for the operation of the dam were cognizant of the appellant's problem and by opening the gates expected to reduce the reservoir as rapidly as possible so that the flows through the uncontrolled notch would be sufficiently low to enable the appellant to rebuild its crossing. (See Exhibit 21, Item 8, to Contracting Officer's Findings of Fact and Tr. pp. 189-190.) However, rains upstream from

the dam and resultant heavy inflows continued to such an extent that the elevation of the reservoir was not sufficiently reduced until early in September 1957 (Tr. pp. 190-191 and Exhibit 11 to Contracting Officer's Findings of Fact).

On 5 September 1957 the appellant constructed a second crossing. The facilities in this crossing for the passage of water were increased by the appellant so as to accommodate a discharge of 1,235 c.f.s.

This crossing was used successfully through 14 September 1957. At 10 p.m., Sunday, 15 September 1957, the river discharge at Mentor reached a temporary peak of 837 c.f.s. This surge of water caused the loss of a 20-foot section of the crossing. This loss cannot be attributed to the operation of the gates because they had been completely closed since 31 August 1957. On 16 September 1957 orders were issued to increase the discharges at Kanopolis to 2,200 c.f.s. The Government official who issued the order understood that the crossing had been completely destroyed on 15 September 1957, and consequently thought that the increase in the discharge would not harm the appellant. Upon learning that he had acted on a mistaken premise, he did not rescind the order because the elevation of the reservoir had by that time reached a sufficiently high stage to make the evacuation of flood water necessary (Tr. pp. 215 and 216).

The appellant was not informed that the gates had been opened until noon 17 September 1957. By that time the appellant had already replaced the 20-foot section. Upon learning that the gates had been opened, the appellant removed the crossing in order to salvage what he could.

There is no doubt but that the crossing would have been destroyed on 19 September 1957 had the appellant

not voluntarily removed it on 17 September 1957, because on that date the discharge at Mentor reached 1,760 c.f.s. The discharges through the controlled gates (1,230 c.f.s.) undoubtedly was the major cause of this high flow.

The conditions existing during the period 18 September 1957 to 4 October 1957 were substantially similar to those which existed after the first crossing was lost. The reservoir elevation remained generally high and until the Government was successful in reducing that elevation by sustaining discharges through the gates the flow at the work site remained too high to permit reconstruction of the crossing.

One more element of damage to the appellant remains to be considered, i.e., the allegation that the worksite was inundated. Although the appellant's brief indicates that the entire work site was flooded, no evidence was furnished that any part of the site was inundated other than the new river channel. Appellant has alleged that its costs were affected by the inundation of only that part of the new channel which is south of the Smoky Hill River. The testimony reveals that the appellant commenced construction of this southside section at the river bank without leaving any obstruction to prevent river water from entering the new channel. At station 26 +00, i.e., approximately 1,600 feet from the natural river channel, the appellant left a plug to provide a crossing of the new channel for a haul road. [The parties were not in agreement as to whether the plug was located at Station 23 +00 or 26 +00 but upon consideration of the evidence we find that the plug was located at 26 +00. See Tr. p. 276 and Inspector's Shift Report for 26 June 1957, Exhibit 41 to Contracting Officer's Findings of Fact.] The plug was twice overtopped by high river stages and as a result the partly excavated channel on the land side of the plug was

inundated. Mr. Amino, appellant's president, testified that the water lay there ". . . most of all Summer and Fall, and made the dirt so wet that when we would load it up to haul it away, why, it was, I would say, from 75 to 80% moisture, and whenever they would dump a load, it would run just like pure water." (Tr. p. 33.) The appellant did not inform us, much less prove, when the plug was overtopped and we have found nothing in the record which would enable us to find either of those dates. Without any dates we are unable to arrive at a conclusion as to whether or not the stages which inundated the channel on the landside of the plug were caused by controlled discharges of the Kanopolis Reservoir. Therefore, we are constrained to hold that the appellant has failed to sustain the burden of proving that such inundation was caused by the operation of the reservoir.

With respect to the riverside part of the new channel we are satisfied that the water followed the appellant's operations, although nothing in the record enables us to determine at what river stage the inundation of this part of the channel commenced. Without this information we cannot determine whether the opening of the gates was the primary cause of inundation. It is possible that the water which flowed through the uncontrolled notch plus the water which originated between the dam and the work site would have caused inundation of this channel, even if the gates had been closed. Accordingly, we hold that the appellant has failed to show that it was damaged in that respect by the operations of the gates of the Kanopolis Reservoir. We are satisfied, of course, that inundation of the channel on both sides of the plug actually occurred and we have considered in the decision which follows whether this constitutes a changed condition.

In the appellant's brief, some emphasis was placed on its allegation that the Government did not notify the ap-

pellant each time the gates at the Kanopolis Dam were opened. However, with one exception there is no evidence to show that the appellant would have been benefited by such notice, or that the lack of notice had any effect, adverse or otherwise, on the appellant's operations. The one time when earlier notice would have avoided some expense was when the gates were opened on 16 September 1957. Notice of that opening was given the appellant at noon on 17 September 1957, more than 24 hours before the water released by the operation of the gate could be expected to reach the site. Had that notice been given several hours earlier the appellant doubtless would not have repaired the 20-foot break in the low-water crossing. We have no evidence, however, that any Government representative knew, or should have known before the notice was given that the 20-foot break was being repaired. We find nothing in these facts which would indicate that the Government was negligent or that it violated any contractual duty.

In conclusion, we think it important to note that the appellant has not alleged that the Government did not operate the reservoir in accordance with its own regulations and for the purpose of controlling floods. Anent this point, we have found nothing in the record to indicate that the Government did not at all times operate the reservoir properly from the viewpoint of flood control. Furthermore, we have found no grounds whatever for a conclusion that the appellant's interests were disregarded. On the contrary we are convinced that the Government did consider the appellant's interests and that those interests were considered when decisions were being made concerning the operations of the reservoir. For example, Mr. Amino testified (Tr. pp. 23-25) that the Government reduced the flow in the Smoky Hill River to make conditions more favorable for

the construction of the first river crossing. Furthermore, as we have indicated above, Government personnel determined what stage would permit the crossing to be constructed and what stage could be sustained by the crossing without damage and took these needs into consideration in its operation of the reservoir.

DECISION

The appellant advances the following specific theories for recovery:

(1) The acts of the Government in operating the Kanopolis Dam in such a manner that a high rate of flow was maintained for an unreasonable length of time constituted a constructive suspension of work as contemplated by General Condition GC-11, SUSPENSION OF WORK.

(2) The "extraordinary high flow of water in the channel which formed the site of construction and the resultant inundation of the whole work site" was a changed condition as contemplated by General Provision 4, CHANGED CONDITIONS.

These are considered below in the order named.

Suspension of Work

The SUSPENSION OF WORK clause provides in pertinent part that:

> The Contracting Officer may order the Contractor to suspend all or any part, of the work for such a period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense to the Contractor, no increase in the contract price will be allowed.

If the appellant is to prevail he must show that the Contracting Officer should have ordered a suspension of the work during the periods when work was being delayed by the operation of the Kanopolis Reservoir. It is quite clear that an obligation to order a suspension of work arises upon a determination that it is "necessary or desirable for the convenience of the Government." These words as applied to a *determination of a Contracting Officer* can logically relate only to functions which are within the scope of his duties as Contracting Officer. We find nothing in the contract to support a conclusion that the Contracting Officer must make a determination that a stoppage which is completely outside his control or responsibility as Contracting Officer is "for the convenience of the Government." In *John A. Johnson & Sons, Inc.*, ASBCA 4403, 59-1 BCA par. 2088, the Armed Services Board of Contract Appeals arrived at a similar conclusion with respect to the same clause. In that decision the Board stated:

. . . .

> Our study leads us to the conclusion that the intendment of this clause was not to transfer to the Government all risks incident to delays but was to provide a contractual basis for compensating a concontractor for delays *caused by the Government in its contractual capacity*, which because they unreasonably delayed the progress of the work, resulted in additional expenses and losses not reasonably anticipated by the contractor at the time it entered into the contract, and the risk of which it had not assumed. Stated in other terms, we are of the opinion that the clause is designed to permit a contracting officer to issue a suspension of work order when he finds it necessary for the convenience of the Government by an affirmative act to interrupt or delay a contractor's work in a matter or manner not otherwise authorized by the contract, or when he finds that the Government is unable to do an act required or authorized by the contract to be per-

formed by the Government within the time specified, or where no time is specified, within a reasonable time, and if the resulting interruption or delay is for an unreasonable length of time causing additional expense or loss to a contractor, without fault on his part, to make him whole through appropriate adjustments in time for performance and in contract price. We are of the opinion that the contracting officer's duty to issue a suspension of work order under this clause is limited to these instances. Cf. *Easterwood,* Pay for Delay, 1 Gov. Contracts Review 5 (1957); *Speck,* Delays-Damages on Government Contracts: Constructive Conditions and Administrative Remedies, Vol. 26 George Washington Law Review, p. 505 (April 1958), and cases and authorities cited.

We are convinced that a delay to a downstream contractor caused by the operation of a reservoir for the purpose of controlling floods is not a delay by the Government in its contractual capacity. On the contrary, we think it clear that the operation of the reservoir for the purpose of controlling floods in the interests of the public in general is a sovereign act within the meaning of *Horowitz* v. *United States,* 267 U. S. 458 and *Jones* v. *United States,* 1 Ct. Cl. 344. See also *Froemming Bros., Inc.* v. *United States,* 108 Ct. Cl. 193. In that case the court held that the Government was not liable for failing (1) to do certain preparatory work and (2) to furnish necessary materials within the times contemplated in the contract. The reason for the delay was the attack on Pearl Harbor and orders from Washington to divert labor and material, which would otherwise have been available to the plaintiff's project, to other and more immediately important work. In arriving at that conclusion the court said:

> The doctrine of these cases, that the Government as a contractor is excused from performance of its contracts if the Government as a sovereign makes laws,

regulations or orders which prevent that performance, seems to us to be an equitable doctrine. If the contract interfered with were between private contractors, and the interposition of a Government priority order or military regulation delayed performance, the contractor who was hurt by the delay could not, of course, claim compensation from the other party to the contract, and would have to bear his own loss. *There seems to us to be no reason why a contractor whose contract happens to be with the Government, should be in a more favored position, with reference to the inconveniences and damages caused by the application of a law or government regulation, than other persons who must accommodate themselves to the law or regulation.* [Emphasis added.]

In the light of the above, we hold that the SUSPENSION OF WORK clause is not applicable to those delays which in the instant appeal were caused by the operation of a flood control reservoir for the purpose of controlling floods.

In arriving at the above conclusion we have not overlooked the fact that on 16 September 1957 the gates at Kanopolis Dam were opened because the responsible Government official had misunderstood a report and thought such action would not harm the appellant. It is clear that the action taken on 16 September 1957 was consistent with and motivated by the Corps of Engineers' duty to evacuate the accumulated flood waters and to restore the full flood storage capacity of the reservoir. The Government official did not rescind the order when he learned that the information regarding the appellant had been misconstrued because he was of the opinion that the condition of the reservoir was such that evacuation was required in the interests of flood control. The waters which were discharged at that time were in fact accumulated flood waters and the discharge at that time was consistent with the previously promulgated operating regulations.

CHANGED CONDITIONS

As previously stated, the appellant has alleged that the high river stages and the resultant saturation of the soil are changed conditions. We have found that high river stages were, in fact, encountered during the period 17 May 1957 to 4 October 1957 and that these stages did cause the soil to be saturated as well as cause substantial delays to the appellant. However, if the conditions which were actually encountered could have been reasonably anticipated from a study of the contract documents or upon an examination of the site, the appellant is not entitled to an adjustment in the contract price under General Provision 4, CHANGED CONDITIONS. This principle is clearly enunciated in *Alvin H. Leal* v. *United States*, (Ct. Cls. No. 199-53, decided 9 April 1960). That case also involved the construction of a new river channel. The contractor complained that the Government had in its possession but did not disclose certain records which would have indicated the presence of subsurface water in the area to be excavated and that the wet conditions encountered were changed conditions. In holding against the contractor, the court said:

> . . .
>
> In previous cases involving Article 4 situations, we have held that the plaintiff was entitled to recover if he encountered unknown subsurface conditions differing materially from that shown by the drawings, specifications, and borings, *and one which could not have been reasonably anticipated from a study of the drawings, specifications and borings, or by an examination of the site.* [Citations] *But, if the contractor miscalculated, he cannot recover. . . .* [Italics added]

The appellant asserts that it could not have reasonably anticipated the conditions which it encountered. On the

contrary, the appellant asserts that it was justified in expecting low river stages for the following reasons:

(1) A statement made by a Government representative together with the wording of contract provision 2-13 b and data contained on contract drawing A-15-44 led appellant to expect favorable stages.

(2) Appellant was misled by the failure of the Government to make available to prospective bidders the records of the past operations of the Kanopolis Reservoir.

The assertions referred to in subparagraph (1) above are stated in more detail below together with our conclusions:

(1) *During a site investigation appellant's president was told by a Government representative that the river stages would remain low during the contract period.*

Mr. Amino, appellant's president testified that, upon asking to be shown the site, he was referred by the Government's area engineer to Mr. Wolfe, a Government inspector. During the site investigation Mr. Amino and Mr. Wolfe stopped near the river, which was at that time quite low and to quote Mr. Amino, "Mr. Wolfe mentioned that he has worked at Kanopolis Dam and that that would probably be the amount of flow we could expect during the construction of this job and that that area out in there was more or less a dust bowl." (Tr. p. 16). We assume arguendo that Mr. Amino's memory with regard to his conversations is more accurate than that of the Government Area Engineer or inspector, each of whose testimony contradicted that of Mr. Amino's. We do not think that the words attributed to Mr. Wolfe would be sufficient to qualify as a representation. The words "probably" and "more or less" mitigate against the idea that a promise or a representation was being made. We are unaware of any reason why appellant's

president should impute to the Government inspector any special ability to predict future river stages which, after all, are primarily dependent upon precipitation. The appellant's president did not allege that he construed Mr. Wolfe's statement as a promise that low river stages would be maintained by the operation of the Kanopolis Reservoir. (See Tr. pp. 54, 55 and 56). In short, we find nothing in the Government Inspector's statement which would justify a prospective contractor in excluding from consideration the reasonable probability that unfavorable weather and high river stages might be encountered during the construction period.

(2) *The contract contained a clause which led appellant to believe that river stages would be low.* The clause upon which appellant relies is quoted below. We have italicized that part which has been emphasized by appellant.

> 2-13. *Channel Crossings.* The Contractor may construct for his own use within the right-of-way, low water crossings on the Smoky Hill River in strict accordance with the following:
>
> *a. Provide for not less than 64 square feet of effective opening in the channel at each crossing.*
>
> *b.* The flow line of the openings shall be set at the flow line of the existing channel.
>
> *c.* The Contractor shall remove the crossings wherever in the opinion of the Contracting Officer the river stage would be adversely affected.
>
> *d.* The crossings shall be used for the sole purpose of the Contractor's hauling equipment.
>
> *e.* The Contractor shall remove the crossing upon completion of the work or whenever its use is no longer required.

We cannot agree that a provision for a minimum opening in a temporary river crossing is any indication, in itself,

that the river flows would remain so low as not to exceed the capacity of that opening. Aside from the fact that the word "minimum" cannot be stretched to mean "maximum" or "sufficient", the very fact that the project was for the control of floods mitigates against such a conclusion.

(3) *The core borings on the contract drawings show a moisture content of 4% to 37% at the lower elevations of the channel excavation.* The core borings represent the water which was found underground at the time the borings were taken. Information obtained from core borings showing a specific percentage of moisture is not an indication that the project won't be inundated.

For the reasons stated above, we hold that the appellant has failed to show that any representations were made by the Government or that the contract or drawings contained anything which would justify a prospective bidder to necessarily expect low river stages during the construction period.

Examination of the contract documents as a whole, we think, leads to a contrary conclusion. The following features of the contract are sufficient to put a prospective bidder on notice of the reasonable possibility of unfavorable river stages at the site of the work:

(1) The title pages of the specifications were headed by the words "Flood-Protection Project, Kansas River Basin, Smoky Hill River, Kansas."

(2) The work to be performed included construction of flood control levees and most of the material for these levees was to be obtained from the riverside of the levees, i.e., from the projected flood plain.

(3) Paragraph SC-11 b contained a record of precipitation for the years 1931 through 1952 which indicated

that heavy rainfall was not limited to any specific season of the year.

Having found nothing in the record which would support a conclusion that the Government misled the appellant by the wording of the contract or by any affirmative actions on the Government's part, we turn to consideration of the appellant's allegation that it was misled by the Government's failure to make available the records of the operation of the Kanopolis Reservoir.

The courts have consistently held for a contractor (although not necessarily under the changed conditions article) where the contractor was *misled* by the failure of the Government to fully disclose facts which were in its possession. Anent this point, the Court of Claims said in *Alvin H. Leal* v. *United States,* supra, that:

> . . .
>
> We have held that the defendant has a duty, if it made borings, or was in possession of pertinent information, to fully disclose and furnish such facts as were found. [Citations] However, a bare withholding is not enough to make out a case, The plaintiff must show that he was in fact misled by the withholding of information. If the plaintiff knew or should have known that it would encounter wet material, although information was withheld, then it cannot be held that he was misled. [Citations]

In applying the above principle to the instant case, we observe that the appellant's president concedes that he was aware of the existence of Kanopolis Reservoir before its bid was submitted and that the site plan showed that this reservoir was located upstream from the work site.

The appellant states that it did not know what effect the operation of the reservoir would have on the work site.

However nothing has been suggested which would convince us that the appellant anticipated, or would have been justified in anticipating, that the reservoir would be operated in a manner calculated to maintain low river stages at the work site, without regard to the over-all effect of such an operation on the flood control capacity of the reservoir. We think rather, that the appellant expected, or should have expected that the reservoir would be operated for the purpose of controlling floods on the Smoky Hill River. We have already found that this is precisely what occurred during the contract period.

But was the Government at fault in not furnishing the appellant with records of the operations of the Kanopolis Reservoir since it was placed into operation in 1948? We are satisfied that the Government often does include in its contracts such information as well as records of past river stages at a point near the site of the work. Records of past river stages are of value to a contractor only if they could enable him to make a reasonable estimate of future conditions. At best, a contractor who relies on an assumption that river stages during any one particular year will be normal as compared to past river stages is taking a risk. If in addition to this normal element of uncertainty, the available records cover a period which cannot reasonably be expected to be typical, these records become virtually valueless and might even be misleading. We hold that the records of the river stages at Mentor and of the releases from the Kanopolis Reservoir fall into the latter category and that, for this reason the Government was justified in omitting them from the specifications. Anent this point, the Government offered the following expert testimony of Mr. William L. Northrop (Tr. pp. 127, 128 and 225):

> *Question.* With the hydrological information that was available to you, could you have come to a self-

evident conclusion on your experience to have eliminated the hydrological information from the Salina project drawings and specifications? [The "hydrological information" referred to was the information as to the discharges from Kanopolis Reservoir from the date the dam was placed into operation (1948) until the date the invitation for bids for the Salina project was issued.]

Mr. Northrop. Yes, sir. It would have been relatively simple to have come to that conclusion, for two or three reasons. One, the period of record is very short with the Kanopolis Reservoir in operation, and if a period of record prior to the operation at Kanopolis would have been shown, there would have been periods of flooding which could have been eliminated or changed or modified by the operation of the reservoir. Also, the short period of record that was available of the Kanopolis operation was a record of extremes. We had the 51 flood, which was a real large disastrous flood larger than they had expected when they designed the Kanopolis project, and that was followed by several years of drought where those records would be very puzzled as to how to interpret it.

For the reasons stated above, we are convinced and so hold that the appellant should have reasonably anticipated that (1) high river stages might occur, (2) the Kanopolis Reservoir would be properly operated for the purpose of controlling floods, and (3) such operation would have an effect on the river stages at the work site. We hold further that the appellant was not misled by the omission of data regarding the past records of the operation of the Kanopolis Reservoir. Accordingly, we find that the high river stages and the resultant inundation of the work site were not changed conditions.

Having found no grounds which would justify allowance of the appellant's claim the appeal is DENIED.

Date: 18 April 1961

/s/ Francis N. Rowe
Francis N. Rowe
Member of the Board

/s/ Harris J. Andrews, Jr.
Harris J. Andrews, Jr.
Member of the Board

/s/ Harold F. Blasky
Harold F. Blasky
Assistant Chairman

* * *

I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decision No. 1582 concerning the appeal of Amino Brothers Company under Contract No. DA-23-028-Civeng-27-239.

Date: May 1, 1961.

/s/ Flora A. Barth
Flora A. Barth
Recorder